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No. 4677

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United States

Circuit Court of Appeals

For the Ninth Circuit.

JEU JO WAN,

Appellant,

vs.

JOHN D. NAGLE, Commissioner of Immigration for the Port of San Francisco,

Appellee.

Transcript of Record.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

FILED
NOV 13 1925
F. D. MONCKTON,
CLERK

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

For Petitioner and Appellant:

GEO. A. McGOWAN, Esq., 550 Montgomery St., San Francisco, California.

For Respondent and Appellee:

UNITED STATES ATTORNEY, San Francisco, Cal.

In the Southern Division of the United States District Court in and for the Northern District of California, Second Division.

No. 18,509.

In the Matter of JEU JO WAN on Habeas Corpus.

PRAECIPE FOR TRANSCRIPT ON APPEAL.

To the Clerk of said Court:

Sir: Please make transcript of appeal in the above-entitled case, to be composed of the following papers, to wit:

1. Petition for writ.
2. Order to show cause.
3. Demurrer.
4. Minute order introducing immigration record at the hearing on demurrer.
5. Judgment and order sustaining demurrer and denying petition.
6. Notice of appeal.

7. Petition for appeal.
8. Assignment of errors.
9. Order allowing appeal.
10. Citation on appeal.
11. Order respecting immigration record.
12. Clerk's certificate.

GEO. A. McGOWAN,
Attorney for Petitioner.

[Endorsed]: Filed Jul. 11, 1925. [1*]

In the Southern Division of the United States District Court in and for the Northern District of California, Second Division.

No. 18,509.

In the Matter of JEU JO WAN on Habeas Corpus. (No. 23700/2–24 SS. "Pres. Wilson," Sept. 18th, 1924.

PETITION FOR WRIT OF HABEAS CORPUS.

To the Honorable United States District Judge, now Presiding in the United States District Court, in and for the Northern District of California, Second Division:

It is respectfully shown by the petition of the undersigned that Jeu Jo Wan, hereinafter in this petition referred to as the "detained," is unlawfully imprisoned, detained, confined and restrained of his liberty by John D. Nagle, Commissioner of Immigration for the Port of San Francisco, at the Im-

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*Page-number appearing at foot of page of original certified Transcript of Record.

migration *State* at Angel Island, County of Marin, State and Northern District of California, Southern Division thereof, and that the said imprisonment, detention, confinement and restraint are illegal, and that the illegality thereof consists in this, to wit:

That it is claimed by the said commissioner that the said detained is an alien of the Chinese race who is a citizen and subject of the Republic of China, and that the said detained arrived at the Port of San Francisco on the SS. "President Wilson" on September 18th, 1924, and thereafter made application to enter the United States upon the following grounds, to wit:

The said detained sought admission into the United States under and in pursuance of the permission contained in a Treaty of Commerce and Navigation between the United States and China, that is the Treaty between said countries of November 17th, 1880 (22 Stat. L. 826), and particularly [2] Article 2 thereof, which is as follows:

> "Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity together with their body and household servants, and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation."

The said detained is a teacher as was and is described and contemplated in said Article 2 of the

said Treaty, and presented a certificate drawn in full and complete compliance with the terms and provisions of Section 6 of the Act of Congress of the United States May 6th, 1882, as amended and added to by the act of July 5th, 1884 (22 Stat. L. 58; 23 Stat. L. 115), which said acts were passed to execute and carry out the provisions of said treaty hereinbefore mentioned, and particularly of said Article 2 thereof, and that the detained presented a certificate issued by the appropriate governmental authority of the country in which he last resided, evidencing and setting forth and containing each of the said facts, things and matters, required to be set forth therein according to the provisions of said Section 6, and that the said certificate was thereafter presented to and was visaed by the appropriate United States Consular Representative of the port from which the said detained embarked upon his said trip to the United States; and your petitioner further alleges that the said certificate so presented by the said detained to commissioner of Immigration for the Port and District of San Francisco, and so presented before the Board of Special Inquiry hereinafter mentioned, was obtained by the permission of the said issuing governmental authority and identified the said detained as a Chinese person other than a laborer, who [3] was entitled by said treaty, or this said act, to come to the United States, and who was about to depart for and come to the United States and obtained such permission which so entitled him to admission into the United States, by the Chinese Government, or by such other foreign

government of which such Chinese shall be a subject or resident, and said certificate was further in the English Language and showed such permission with the name of the permitted person in his proper signature; it further stated the individual family and tribal name in full, together with the title or official rank, if any, the age, height, and all physical peculiarities, the former and present occupation or profession, when and where and low long pursued, and the place of residence of the person to whom the certificate was issued, and that such detained was such a person who was entitled by the said treaty and the said acts to come into the United States, and the said certificate, as so issued, bore the visae of the diplomatic representative of the United States in the foreign country from which such certificate was issued, or of the consular representative of the United States at the port or place from which the person named in the certificate was about to depart, and that said diplomatic or consular endorsement was not placed upon said certificate until after it had been found upon examination that the said statements contained in said respective certificate was true. Your petitioner further alleges that the said certificate *prima facie* established the right of the said detained to enter the United States.

Your petitioner further alleges that after the arrival of the said detained at the Port of San Francisco and presenting his application to enter the United States he was accorded a hearing before a Board of Special Inquiry and was denied admission

into the United States by said [4] Board, notwithstanding the said Board found and conceded, and admitted that none of the facts contained in said certificate had been converted or found to be untrue by the members of said Board of Special Inquiry, but that, your petitioner alleges, the said Board of Special Inquiry denied the said detained admission into the United States, holding that he was inadmissible under Section 13 of the Immigration Act of 1924, for the reason that the said detained is an alien ineligible to citizenship and that he was not exempted by any of the provisions enumerated therein, and was further inadmissible under the terms of Section 4, Subdivision (d) of the last-mentioned act, and they thereupon denied the application of the said detained to enter the United States; that thereafter an appeal was taken from said excluding decision to the Secretary of Labor and that the said appeal was denied upon the grounds and for the reasons as set forth and held by the said Board of Special Inquiry.

That it is the intention of the said Commissioner to deport the said detained from and out of the United States upon the SS. "President Wilson" due to sail from the Port of San Francisco at 12:00 M. November 29th, 1924, and your petitioner alleges that unless this court intervenes in response to the prayer of your petitioner hereinafter set forth said deportation will be then and there effected.

The said Commissioner claims that in all of the proceedings hereinbefore mentioned, recited and re-

ferred to, the said detained has had a full and fair hearing attesting the facts upon which his right of admission into the United States is based, and that the action of said Board of Special Inquiry, the said Commissioner, and the said Secretary, was done in the full and proper exercise and the authority committed to them by said statutes, with the qualification that said hearing and action only had reference to the rights [5] of the said detained under the said Immigration Act of 1924, and that the case of the said detailed has not been either heard or determined by the said Commissioner, the Board of Special Inquiry, or the Secretary of Labor, with respect to his right of admission under the Chinese Exclusion Laws, the said Commissioner and the said Secretary claiming that the said denial of the right of admission of the said detained under the Immigration Act of 1924, renders unnecessary the consideration of the case of the said detained under the said Chinese Exclusion Laws.

But, on the contrary, your petitioner alleges that the said Commissioner, the members of the said Board of Special Inquiry, and the said Secretary of Labor, have misconstrued the statutes hereinabove referred to and have made a mistaken and wrongful interpretation thereof to the detriment of the said detained, resulting in the withholding from the said detained his right of admission into the United States, and in his being deprived of his liberty without the hearing to which he is entitled under the law, and hence he is restrained of his liberty without due process of law; that they have violated

and disregarded the treaty rights of the said detained as a citizen of the Republic of China, and made a mistaken and wrongful interpretation thereof; and have denied and are withholding from the said detained the rights and privileges guaranteed to him under the treaties between the Government of the United States and the Government of China, of which country he is a citizen; that they have violated and disregarded the constitutional guarantees and rights of the said detained in this that the treaty between China, the country of which he is a citizen, and the United States, shall be the supreme law of the land, and they are withholding the rights and privileges guaranteed to the said detained under the Constitution of the United States as contained in said treaties, and all as hereinafter more particularly set forth: [6]

I.

Your petitioner alleges, upon his information and belief, that the said administrative authorities, that is to say, the Commissioner of Immigration, the Board of Special Inquiry and the Secretary of Labor, have made a mistaken construction of the statute and have misconstrued the same in this that while said Section 13 of the Immigration Act of 1924 provides in subdivision (c) that

> "No alien ineligible to citizenship shall be admitted to the United States unless such alien * * * (3) is an immigrant as defined in Section 3,"

and your petitioner alleges that Section 3 of the said Act provides:

> "When used in this act the term immigrant means any alien departing from any place outside of the United States destined for the United States, except * * * (6) an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation,"

and your petitioner alleges that the said administrative officers hereinbefore named have either misconstrued the statute or not given the detained the benefit thereof, as contained in the third exception of paragraph (c) of Section 13, in this that he was not an immigrant as defined in said Section 3, and your petitioner alleges that there is a treaty of commerce and navigation between the Governments of the United States and China, and under and by virtue of the terms and provisions of Article 2 of said treaty of 1880, and Article 7 of the treaty of 1868, the concluding portion of which is as follows:

> " * * * The citizens of the United States may freely establish and maintain schools within the Empire of China [7] at those places where foreigners are by treaty permitted to reside; and reciprocally, Chinese subjects may enjoy the same privileges and immunities in the United States,"

That the said detained is therein specifically mentioned as a teacher and as such class is coming to

the United States under and by virtue of the terms and provisions of a present existing treaty of commerce and navigation, and that his sole purpose in coming to the United States is to carry on trade, as is specifically mentioned and set forth in said Section 6 certificate, and that in holding to the contrary the said administrative officers have misconstrued the said statutes and made a wrongful interpretation thereof, and they have denied to the said detained the rights appertaining unto him as a Chinese national and as guaranteed to him in the said treaties between the United States and China; and the said administrative officers have further violated the constitutional provisions and guarantees contained in Section 2 of Article 6 thereof in denying to said treaty stipulations their place as part and parcel of the supreme law of the land; and your petitioner alleges, upon his information and belief, that for said wrongful and erroneous construction of the statute the said denial of the said detained of his said treaty rights and said withholding of the constitutional provision hereinbefore referred to the said detained is deprived of his liberty without due process of law, is denied the equal protection of the law, and is wrongfully and unlawfully held in custody by the said Commissioner.

That your petitioner has in his possession a copy of the Immigration Board of Special Inquiry hearing in the case of the said detained, and the same is separately filed herewith as Exhibit "A," and is now referred to with the same force and effect as

if set forth in full herein. Your petition further alleges that the *s*ritten decision of the [8] Secretary of Labor dismissing the appeal and sustaining the denial of the said detained herein to enter the United States is not in the possession of your petitioner, and no copy thereof could have been obtained in time to file with this petition in time to prevent the deportation of the said detained, and for said reason your petitioner stipulates that upon the hearing of this matter that the said decision of the Secretary of Labor in the case of the said detained may be then and there introduced in evidence as part and parcel of this petition.

That the said detained, being in detention at the Angel Island Immigration Station, as hereinbefore stated, is unable to verify this petition upon his own behalf, but your petitioner, as his next friend, and at his special instance and request, verifies this petition and presents the same in the name of the said detained and as his act and for him as his deed, and for his benefit.

WHEREFORE, your petitioner prays that a writ of habeas corpus issue herein as prayed for, directed to the said Commissioner commanding and directing his to hold the body of the said detained within the jurisdiction of this court, and to present the body of the said detained before this Court at a time and place to be specified in said order, together with the time and cause of his detention so that the same may be inquired into to the end that the said detained may be restored to his liberty and go hence without day.

Dated at San Francisco, California, November 26th, 1924.

JEW HEE.

GEO. A. McGOWAN,
Attorney for Petitioner,
550 Montgomery St., San Francisco, Calif. [9]

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

———, being first duly sworn according to law, doth depose and say:

That your affiant is the petitioner named in the foregoing petition; that the same has been read and explained to him and he knows the contents thereof; that the same is true of his own knowledge except as to those matters which are therein stated on his information and belief, and as to those matters he believes it to be true.

JEW HEE.

Subscribed and sworn to before me this 26th day of November 1924.

[Seal] R. H. JONES,
Notary Public.

[Endorsed]: Filed Nov. 26, 1924. [10]

[Title of Court and Cause.]

ORDER TO SHOW CAUSE.

Good cause appearing therefor, and upon reading the verified petition on file herein:

IT IS HEREBY ORDERED that John D. Nagle, Commissioner of Immigration for the Port of San Francisco, appear before this Court on the 1 day of December, 1924, at the hour of 10 o'clock A. M. of said day, to show cause if any he has, why a writ of habeas corpus should not be issued herein, as prayed for, and that a copy of this order be served upon the said Commissioner, and a copy of the petition and said order be served upon the United States Attorney for this District, his representative herein.

AND IT IS FURTHER ORDERED that the said John D. Nagle, Commissioner of Immigration, as aforesaid, or whoever, acting under the orders of the said Commissioner, or the Secretary of Labor, shall have the custody of the said Jeu Jo Wan, or the master of any steamer upon which they may have been placed for deportation by the said Commissioner, are hereby ordered and directed to retain the said Jeu Jo Wan within the jurisdiction of this Court until its further order herein.

Dated at San Francisco, California, November 26, 1924.

BOURQUIN,
United States District Judge.

[Endorsed]: Filed Nov. 26, 1924. [11]

[Title of Court and Cause.]

DEMURRER TO PETITION FOR WRIT OF HABEAS CORPUS.

Comes now the respondent, John D. Nagle, Commissioner of Immigration, at the Port of San Francisco, in the Southern Division of California, and demurs to the petition for a writ of habeas corpus in the above-entitled cause and for grounds of demurrer alleges:

I.

That the said petitioner does not state facts sufficient to entitle petitioner to the issuance of a writ of habeas corpus, or for any relief thereon.

II.

That said petition is insufficient in that the statements therein relative to the record of the testimony taken on the hearing of the said applicant are conclusions of law and not statements of the ultimate facts.

WHEREFORE, respondent prays that the writ of habeas corpus be denied.

STERLING CARR,
United States Attorney.
ALMA MYERS,
Asst. United States Attorney,
Attorneys for Respondent.

[Endorsed]: Filed Feb. 28, 1925. [12]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Saturday, the 28th day of February, in the year of our Lord one thousand nine hundred and twenty-five. Present: The Honorable FRANK H. KERRIGAN, Judge.

[Title of Cause.]

MINUTES OF COURT—FEBRUARY 28, 1925—ORDER SUBMITTING DEMURRER.

This matter came on regularly this day for hearing on order to show cause as to the issuance of a writ of habeas corpus herein. Geo. A. McGowan, Esq., was present as attorney for and on behalf of petitioner and detained. T. J. Riordan, Esq., Asst. U. S. Atty., was present for and on behalf of respondent, and filed demurrer to petition, and all parties consenting thereto, it is ordered that the Immigration Records be filed as Respondent's Exhibits "A" and "B," and that the same be considered as part of original petition. After argument by the respective attorneys, the Court ordered that said matter be and the same is hereby submitted. [13]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 19th day of June, in the year of our Lord one thousand nine hundred and twenty-five. Present: The Honorable FRANK H. KERRIGAN, Judge.

[Title of Cause.]

MINUTES OF COURT—JUNE 19, 1925—ORDER DENYING PETITION FOR WRIT, etc.

The application for a writ of habeas corpus and the demurrer to the petition, heretofore heard and submitted, being now fully considered, it is ordered that said demurrer be sustained, the rule to show cause discharged, and the petition for a writ of habeas corpus herein be and same is hereby denied. [14]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To the Clerk of the Above-entitled Court, and to the Hon. STERLING CARR, United States Attorney for the Northern District of California:

You, and each of you, will please take notice that Jeu Jo Wan, the petitioner and the detained above named, does hereby appeal to the Circuit Court of Appeals of the United States for the Ninth Circuit thereof, from the order and judgment made and

entered herein on the 19th day of June, 1925, sustaining the demurrer to and in denying the petition for a writ of habeas corpus filed herein.

Dated at San Francisco, California, June 22d, 1925.

GEO. A. McGOWAN,
Attorney for Petitioner and Appellant Herein.
[15]

[Title of Court and Cause.]

PETITION FOR APPEAL.

Now comes Jeu Jo Wan, the petitioner and the appellant herein, and says:

That on the 19th day of June, 1925, the above-entitled court made and entered its order denying the petition for a writ of habeas corpus, as prayed for, on file*d* herein, in which said order in the above-entitled cause certain errors were made to the prejudice of the appellant herein, all of which will more fully appear from the assignment of errors filed herewith.

WHEREFORE, this appellant prays that an appeal may be granted in his behalf to the Circuit Court of Appeals of the United States for the Ninth Circuit thereof, for the correction of the errors so complained of, and further, that a transcript of the record, proceedings and papers in the above-entitled cause, as shown by the praecipe, duly authenticated, may be sent and transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit thereof; and further, that the said

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 19th day of June, in the year of our Lord one thousand nine hundred and twenty-five. Present: The Honorable FRANK H. KERRIGAN, Judge.

[Title of Cause.]

MINUTES OF COURT—JUNE 19, 1925—ORDER DENYING PETITION FOR WRIT, etc.

The application for a writ of habeas corpus and the demurrer to the petition, heretofore heard and submitted, being now fully considered, it is ordered that said demurrer be sustained, the rule to show cause discharged, and the petition for a writ of habeas corpus herein be and same is hereby denied. [14]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To the Clerk of the Above-entitled Court, and to the Hon. STERLING CARR, United States Attorney for the Northern District of California:

You, and each of you, will please take notice that Jeu Jo Wan, the petitioner and the detained above named, does hereby appeal to the Circuit Court of Appeals of the United States for the Ninth Circuit thereof, from the order and judgment made and

entered herein on the 19th day of June, 1925, sustaining the demurrer to and in denying the petition for a writ of habeas corpus filed herein.

Dated at San Francisco, California, June 22d, 1925.

GEO. A. McGOWAN,
Attorney for Petitioner and Appellant Herein.

[15]

[Title of Court and Cause.]

PETITION FOR APPEAL.

Now comes Jeu Jo Wan, the petitioner and the appellant herein, and says:

That on the 19th day of June, 1925, the above-entitled court made and entered its order denying the petition for a writ of habeas corpus, as prayed for, on file*d* herein, in which said order in the above-entitled cause certain errors were made to the prejudice of the appellant herein, all of which will more fully appear from the assignment of errors filed herewith.

WHEREFORE, this appellant prays that an appeal may be granted in his behalf to the Circuit Court of Appeals of the United States for the Ninth Circuit thereof, for the correction of the errors so complained of, and further, that a transcript of the record, proceedings and papers in the above-entitled cause, as shown by the praecipe, duly authenticated, may be sent and transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit thereof; and further, that the said

detained may remain at large upon the bond heretofore given by him in this matter during the pendency of the appeal herein, so that he may be produced in execution of whatever judgment may be finally entered herein.

Dated at San Francisco, California, June 22d, 1925.

GEO. A. McGOWAN,
Attorney for Petitioner and Appellant Herein.

[16]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now Jeu Jo Wan, by his attorney, Geo. A. McGowan, Esq., in connection with his petition for an appeal herein, assigns the following errors which he avers occurred upon the trial or hearing of the above-entitled cause, and upon which he will rely, upon appeal to the Circuit Court of Appeals for the Ninth Circuit, to wit:

First: That the Court erred in denying the petition for a writ of habeas corpus herein.

Second: That the Court erred in holding that it had no jurisdiction to issue a writ of habeas corpus as prayed for in the petition herein.

Third: That the Court erred in sustaining the demurrer and in denying the petition of habeas corpus herein and remanding the petitioner to the custody of the immigration authorities for deportation.

Fourth: That the Court erred in holding that the allegations contained in the petition herein for a

writ of habeas corpus and the facts presented upon the issue made and joined herein are insufficient in law to justify the discharge of the petitioner from custody as prayed for in said petition.

Fifth: That the judgment made and entered herein is contrary to law.

Sixth: That the judgment made and entered herein is [17] not supported by the evidence.

Seventh: That the judgment made and entered herein is contrary to the evidence.

Eighth: That the Court erred in holding that a school teacher was not a trader as that term is used in the Immigration Act of 1924.

Ninth: That the Court erred in holding that the rights reserved to Chinese Teachers under Article VII of the Treaty with China of 1868, and Article II of the Treaty with China of 1880, are encroached upon and violated by the Immigration Act of 1924.

WHEREFORE, the appellant prays that the judgment and order of the Southern Division of the United States District Court for the Northern District of the State of California, Second Division, made and entered herein in the office of the Clerk of the said Court on the 19th day of June, 1925, discharging the order to show cause, sustaining the demurrer and in denying the petition for a writ of habeas corpus, be reversed, and that this cause be remitted to the said lower court with instructions to issue the writ of habeas corpus, as prayed for in said petition.

Dated at San Francisco, California, June 22d, 1925.

GEO. A. McGOWAN,
Attorney for Petitioner and Appellant Herein.

Service of the within notice of appeal, petition for appeal and assignment of errors, and receipt of a copy thereof, is hereby admitted this 23d day of June, 1925.

STERLING CARR,
United States Attorney.

[Endorsed]: Filed Jun. 23, 1925. [18]

[Title of Court and Cause.]

ORDER ALLOWING PETITION FOR APPEAL
(and Continuing on Bond).

On this 23d day of June, 1925, comes Jeu Jo Wan, the detained herein, by his attorney, Geo. A. McGowan, Esq., and having previously filed herein, did present to this Court, his petition praying for the allowance of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, intended to be urged and prosecuted by her, and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and further praying that the detained may remain at large upon the bond previously given herein upon his behalf, and that

such other and further proceedings may be had in the premises as may seem proper.

ON CONSIDERATION WHEREOF, the Court hereby allows the appeal herein prayed for, and orders execution and remand stayed pending the hearing of the said case in the United States Circuit Court of Appeals for the Ninth Circuit, and that the said detained may remain at large upon the bond previously given upon his behalf during the further proceedings to be had herein and that he be required to surrender himself in execution of whatever judgment is finally entered herein at the termination of said appeal.

Dated at San Francisco, California, June 23d, 1925. [19]

FRANK H. KERRIGAN,
United States District Judge.

Service of the within order allowing petition for appeal (and continuing on bond) and receipt of a copy thereof, is hereby admitted this 23d day of June, 1925.

STERLING CARR,
United States Attorney.

[Endorsed]: Filed Jun. 23, 1925. [20]

[Title of Court and Cause.]

ORDER TRANSMITTING ORIGINAL EXHIBITS.

It appearing to the Court that the original immigration records appertaining to the application of

Jeu Jo Wan, the detained herein, to enter the United States were introduced in evidence before and considered by the lower court in reaching its determination herein, and it appearing that said records are a necessary and proper exhibit for the determination of said case upon appeal to the Circuit Court of Appeals:

It is now, therefore, ordered, upon motion of Geo. A. McGowan, Esq., attorney for the detained herein, that the said immigration records may be withdrawn from the office of the Clerk of this Court and filed by the Clerk of this Court in the office of the Clerk of the United States Circuit Court of Appeals in and for the Ninth Judicial District, said withdrawal to be made at the time the record on appeal herein is certified to by the Clerk of this Court.

Dated at San Francisco, California, June 23d, 1925.

FRANK H. KERRIGAN,
United States District Judge.

Service of the within order transmitting original exhibits, and receipt of a copy thereof, is hereby admitted this 23d day of June, 1925.

STERLING CARR,
United States Attorney.

[Endorsed]: Filed Jun. 23, 1925. [21]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 21 pages, numbered from 1 to 21, inclusive, contain a full, true and correct transcript of the records and proceedings, in the Matter of Jeu Jo Wan, on Habeas Corpus, No. 18509, as the same now remains on file and of record in this office; said transcript having been prepared pursuant to the praecipe for transcript on appeal.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of eight dollars and sixty-five cents ($8.65), and that the same has been paid to me by the attorney for the appellant herein.

Annexed hereto is the original citation on appeal.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 27th day of August, A. D. 1925.

[Seal] WALTER B. MALING,
Clerk.
By. C. M. Taylor,
Deputy Clerk. [22]

CITATION ON APPEAL.

United States of America,—ss:

The President of the United States, To JOHN D. NAGLE, Commissioner of Immigration for the Port of San Francisco, and STERLING CARR, United States Attorney for the Northern District of California, His Attorney Herein, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Southern Division of the Northern District of California, Second Division, wherein Jeu Jo Wan is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable FRANK H. KERRIGAN, United States District Judge for the Southern Division of the Northern District of California this 23d day of June, A. D. 1925.

FRANK H. KERRIGAN,
United States District Judge. [23]

Service of the within citation and receipt of a copy thereof is hereby admitted this 29th day of June, 1925.

STERLING CARR,
United States Attorney,
Attorney for Appellee.

This is to certify that a copy of the within citation on appeal was lodged with me as the Clerk of this Court upon the 23d day of March, 1925.

W. B. MALING,
Clerk U. S. Dist. Court in and for the Nor. Dist. of Calif. at San Francisco.

By C. W. Calbreath,
Deputy.

[Endorsed]: Filed Jun. 23, 1925.

[Endorsed]: No. 4677. United States Circuit Court of Appeals for the Ninth Circuit. Jeu Jo Wan, Appellant, vs. John D. Nagle, Commissioner of Immigration for the Port of San Francisco, Appellee. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Filed August 27, 1925.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 4677

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JEU JO WAN, On Habeas Corpus,
Appellant,

vs.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco,
Appellee.

REPLY BRIEF FOR APPELLEE.

FILED
DEC 1 1925
F. D. MONCKTON, CLERK

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No. 4677

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JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco,
Appellee.

REPLY BRIEF FOR APPELLEE.

STATEMENT.

This is an appeal from the order of the District Court of the Northern District of California sustaining a demurrer to and denying a petition for a writ of habeas corpus. The petition had been filed to test the validity of an order of the Immigration Department excluding petitioner, an alien Chinese person, from the United States when he applied for entry.

The record of the Department of Labor in regard to the case of petitioner has been sent to this court

and constitutes a part of the record. It appears therefrom that under date of February 19, 1924, two person residing at San Diego, California, describing themselves as American citizens of Chinese birth, made an affidavit stating that they were "desirous of of establishing and maintaining a native school for their own and other Chinese children in said country to supplement their American education". They further stated that they wished to procure the services of Jeu Jo Wan (petitioner) a teacher at Macoo, Canton, China, to take charge of such school in San Diego, and that the affidavit was to facilitate that purpose. It further appears from documents in the folder that on August 25, 1924, the petitioner verified an application for an immigration visa (non-quota) at Hong Kong, using consular form number 256. In this form he stated that his calling, or occupation "is teacher" and "that my purpose in going to the United States is teaching and I intend to remain indefinite". He thereupon negatives his being a member of various classes of individuals excluded from admission but admitted two: "(25) natives of Asiatic barred zone"; "(27) aliens inadmissible to citizenship" and thereupon stated "that he claimed to be exempt from exclusion on account of class number 25 and 27 noted above, for the reasons following, to wit, professor in Chinese school under Section 4 (d) that he claimed to be a non-quota immigrant as defined by Section 4 of the Immigration Act of 1924, and the facts on which such claim is

based are as follows, to wit: on account of being professor in Chinese school under Section 4 (d)". Thereupon the vice-consul appended a visa as a non-quota immigrant under the subdivision of the section referred to. He also sent to the Commissioner of Immigration at San Francisco a precis in re Jeu Jo Wan, stating in brief pertinent facts. There was also given to petitioner a so-called "form of Chinese certificate", a Section 6 Certificate, indicating in the case of petitioner that his former occupation and present occupation is "teacher", and giving the time and place pursued, the certificate having been issued at Hong Kong, May 2, 1924, and later certified to by the Consul General of the United States.

Petitioner arrived at San Francisco on the 19th of September, 1924, and was by an immigration officer held for examination before a board of special inquiry.

On September 24, 1924, the petitioner was examined before the Board of Special Inquiry, and,among other things stated "that he was coming to this country to be a teacher in San Diego; that he expected to remain in the country "as long as they engage me as a teacher", and that there was no agreement about the time of engagement; that he intends to return to China when the engagement is ended (Ex. A, p. 5). Witness was asked:

> "Q. Just what does your education qualify you to teach?

A. A teacher for the higher primary school.
Q. Are you able to qualify as a professor of a college, academy, seminary or university?
A. No." (Ex. A, p. 6.)

Witness stated that he would not come to the country at this time if it were not for the agreement to teach school in San Diego and:

"Q. Does the board correctly understand you to state that you are qualified to teach only up to the higher primary?
A. Yes." (Ex. A, p. 5.)

On October 1, 1924, the statement of certain witnesses was taken before an inspector in charge at San Diego, being one Hu Him Ting, being one of the persons referred to in the affidavit as desiring to establish a Chinese school.

Referring to the school, it is said:

"Everything is prepared." "We have rented the school building on I Street, number 304, if I remember right, here in San Diego. We have that all rented and when he comes we will fix it up." "And that the rent was $25 per month."

And referring to the employment of Jeu Jo Wan:

"We have agreed to pay him $100 per month. We have not agreed to retain him any certain length of time but if he is alright we will keep him for a teacher right along." (Ex. A, pp. 15, 14.)

At the same time witness Jow Pon Don testified that he was one of the persons signing the document referred to and said that it was agreed to pay peti-

tioner $100 a month, the expense to be divided among the pupils (Ex. A, p. 12). The witness' statement that he was an American citizen was admitted to be erroneous, but the circumstance is, perhaps, immaterial.

On the 14th day of October, 1924, at a further hearing before the Board of Special Inquiry petitioner gave testimony as to his situation and status. At such examination the applicant testified through an interpreter and was asked the following question:

> "Q. In order that there may be no confusion in your mind as to the requirements laid down by the present Immigration Act, approved May 26, 1924, I will request the interpreter to read you Section 4 (d) same Act (interpreter complies).
>
> Q. Do you think you come under the requirements of the extract of law just read you?
>
> A. No, I don't think I do."

Of course, the construction of the law is in your hands (Ex. A, p. 19).

Upon such testimony the Board of Special Inquiry recommended the exclusion of petitioner, and, an appeal having been taken, the record was sent to the Commissioner General of Immigration. Upon a hearing in that bureau before a Board of Review, the following decision was made:

> "55392/636 November 12, 1924.
>
> San Francisco
>
> In re: Jeu Jo Wan, aged 30.
>
> This case comes before the Board of Review on appeal.

Attorney Hendry granted a hearing. Attorney McGowan at the port.

This is the case of a Chinese applicant who arrived at the port of San Francisco on September 19, 1924, and sought admission as a Section 6 teacher. He was excluded because the port authorities do not believe that he is qualified for admission under Subdivison (d) of Section 4 of the Act of 1924.

The applicant has presented a teacher's Section 6 certificate with a non-quota immigration visa issued under Section 4 of the Act of 1924. Subdivision (d) of Section 4 provides for the admission of 'An immigrant who continuously for at least two years immediately preceding the time of his application for admission to the United States has been, and who seeks to enter the United States solely for the purpose of carrying on the vocation of * * * professor of a college, academy, seminary, or university * * *''

The record would appear to indicate that this man is seeking admission upon the instigation of two residents of this country, viz., one Jow Pon Din and one Hee Hen Teng. These two men have been examined, and state that it is their desire to have a teacher from China instruct their own, as well as a few other children in the neighborhood, in the Chinese language and ways. The applicant states that he is a graduate of a normal school, and claims to have taught the elementary classes in his home village as well as the middle class school in Canton.

The section of the law under which he is attempting to enter was read to him in the Chinese language and explained, and, when asked if he thought he could qualify, he replied in the negative. He was also asked if he could qualify to accept the professorship in any college, and replied that he could not. It is clear that, while

this man is a teacher of the elementary grades, he is not a professor as contemplated by Congress in Subdivision (d) of Section 4, in which it referred strictly to professors.

The attorney has attempted to show that the use of the word 'vocation' in said subdivision means any kind of teacher, but it is believed that his interpretation of this word is erroneous.

After careful consideration of the entire record, the Board of Review is of the opinion that this man is not admissible under Subdivision (d) of Section 4; and, as he is otherwise without an admissible status, it becomes necessary to recommend exclusion.

It is recommended that the appeal be dismissed.

W. N. SMELSER,
Chairman, Secy. & Comr. Genl's Board of Review.

ES:hms

So ordered:

Robe Carl White,
Second Assistant Secretary."

ARGUMENT.

I.

APPELLANT WAS INELIGIBLE TO CITIZENSHIP; WAS INADMISSIBLE AS A NON-QUOTA IMMIGRANT AND NOT WITHIN ANY EXCEPTION TO THE TERM "IMMIGRANT" AS DEFINED IN THE IMMIGRATION ACT OF 1924.

It is conceded that the applicant was an alien Chinese person and thus ineligible to citizenship. It was so stated in his application to the consul for a visa.

Under the provisions of Subdivision (c) of Section 13 of the Immigration Act of 1920, it is provided:

> " (c) No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a non-quota immigrant under the provisions of subdivision (b), (d), or (e) of Section 4, or (2) is the wife, or the unmarried child under 18 years of age, of an immigrant admissible under such subdivision (d), and is accompanying or following to join him, or (3) is not an immigrant as defined in Section 3."

In his application the petitioner did not claim to come under any admissible subdivision of Section 4 of the Act, except under Subdivision (d) of Section 4, as follows (pertinent matter, our italics):

"(d) An immigrant who continuously for at least two years immediately preceding the time of his application for admission to the United States has been, and who seeks to enter the United States *solely* for the *purpose* of, *carrying on the vocation* of minister of any religious denomination, *or professor of a college, academy, seminary, or university;* and his wife, and his unmarried children under 18 years of age, if accompanying or following to join him."

Petitioner claimed to be a professor of a college, academy, seminary or university. Reaching the United States, however, when the case came before a Board of Special Inquiry, on September 24, 1924, page 7, he was asked, "Q. What does your education qualify you to teach? A. A teacher for the higher primary school. Q. Are you able to qualify as a professor of a college, academy, seminary or university? A. No." (Ex. A, p. 6.)

Later, on October 14, 1924, in a further hearing, Subdivision (d) of Section 4 referred to was read to applicant by the interpreter, whereupon he was asked, "Do you think you come under the requirements of the extract of the law just read to you? A. No, I don't think so. Of course the construction of the law is in your hands." (Ex. A, p. 19.)

It thus appears that it could not be deemed that the board acted unfairly in accepting as a fact the precise thing declared by petitioner on oath.

Later an appeal was taken to the Secretary of Labor and the matter was presented by counsel at Washington in a brief appearing in the files. There was no question as to the Department's view of the facts. Counsel urged that under the phraseology of Subdivision (d) referred to one would be deemed qualified, if he was any kind of a teacher; that is to say, that the words "occupation of the professor" were not restricted to being a professor of the schools referred to, but that it meant any kind of a teacher. It is not surprising that this view did not meet with the Department. Had Congress so intended it would have been quite simple to use the word "teacher".

The order of exclusion having been affirmed by the secretary, the petitioner has shifted his ground and has applied for a writ of habeas corpus upon the theory not that he is included within Subdivision (d) of Section 4, but that his case would come within the provisions of Subdivision (6) of Section 3. The pertinent portions of that section are as follows:

> "Sec. 3. When used in this act the term 'immigrant' means any alien departing from

> any place outside the United States destined for the United States, except * * * (6) an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation."

Thus petitioner is driven by the exigencies of the case to now contend that he shows that he comes in solely to carry on trade, and this under and in pursuance of an existing treaty of commerce and navigation.

But the case of appellant seeking to come to this country to be employed as a teacher of a primary school is not the case of one coming "solely to carry on trade". This is seen,

(a) From a consideration of the meaning of the phrase "solely to carry on trade" as defined by lexicographers; and

(b) From a consideration of the rule of statutory construction which would assign a meaning to each portion of the statute for it appears that the Congress by another provision regulated the entry of such members of the teaching profession as it desired to admit.

The phrase referred to would not include a teacher.

Thus in the Standard Dictionary the primary meaning assigned to the word "trader" is,

> "1. One who trades, particularly one whose business is to buy and sell goods. 2. A vessel employed in any particular (foreign or coastwise) trade; as, an East-Indian *trader.*"

And the word "trade" as a verb is defined as,

> "1. To dispose of by bargain and sale; now, especially, to barter; exchange, as to *trade* horses."

And the word "trade" as a noun is defined as,

> "1. A business learned or carried on for procuring subsistence or profit; particularly, a skilled or specialized handicraft; the occupation of an artisan.
>
> Formerly trades were entered only through apprenticeship. The word *trade* is properly applied to pursuits which are distinguished from unskilled labor, agricultural employments, commerce, the learned professions, and the fine arts. 2. Buying and selling for gain or as a means of livelihood; mercantile traffic; commerce; hence, any individual bargain; as, to engage in foreign *trade.*"

In the New International Dictionary, the word "trader' is defined as,

> "The act or business of exchanging commodities by barter, as by buying and selling for money; commerce."

The word "trade" is defined as,

> "One engaged in trade or commerce; one who makes a business of buying and selling or bartering; a merchant as a trader to the East Indies."

Persons who are said to carry on "trade" are considered to be engaged in merchandising, and the ordinary skilled handicraft, as distinguished from *agriculture, learned professions and liberal arts* which are not so included.

The law lexicographers give substantially the same meaning. Thus Bouvier's Law Dictionary primarily defines "trade" as

> "Any sort of dealings by way of sale or exchange; commerce, traffic";

also

> "The dealings in a particular business; as, the Indian trade; the business of a particular mechanic; hence boys are said to be put apprentices to learn a trade",

and the same author defines a "trader" as

> "One who makes it his business to buy merchandise or goods and chattels and to sell the same for the purpose of making a profit."

Such meanings are commonly assigned to the word in construing the bankruptcy act.

And among the definitions given in the Encyclopedic Dictionary, is the following:

> "The business which a person has learned, and which he carries on for subsistence or profit, occupation; particular employment, whether

> manual or mercantile as distinguished from the *liberal arts* or the *learned professions* and *agriculture.*"

Appellant has taken some pains to show that the teaching profession is a learned profession. But, as we have seen from the definitions of lexicographers, such calling would be precisely that not included in the term "trade" or "trader". For, as we have seen, the words "trade" or "trader" are primarily of a mercantile meaning and, especially, they do not include *agriculture, liberal arts,* or the *learned professions.* The Japanese Treaty authorizes the entry of Japanese nationals into the United States to "carry on trade" and authorizes them to establish houses for "residential and commercial purposes". But that the legislature of this state can prevent them from holding lands for *agriculture* has been well established.

The brief of appellant contains liberal quotations from the Congressional Record of proceedings in the Senate on the occasion of the adoption of the so-called restrictive "Ineligible to Citizenship" ban. Proceedings in a legislative body have a place in the construction of statutes, but this is only where the statute is ambiguous and needs construction. In the instant case such is not the fact for a statute that restricts entry to persons "coming solely for trade" and which *ex industria* specifies that the members of the teaching profession who can come are those coming solely for the purpose of carrying

on the vocation of professor of a *college, academy, seminary* or *university,* is not ambiguous in that respect. It could not be contended that the Congress, having made this provision respecting teachers, meant to include other teachers not specified under the term "coming solely for trade". Moreover it is quite apparent that the discussion in the Senate was concerning the Japanese Treaty of 1911 which does not refer to teachers but does employ the term "To carry on trade" (37 Stat. 1504).

The references of Senator Shortridge were to the Japanese treaty of 1911, (brief Record, Vol. 65, page 5744) (Appellant's brief, p. 9).

It is no doubt true that the amendment under discussion is not to be deemed to refer to the Japanese Treaty alone. But as far as the discussion on the floor of the Senate is to be looked to as an aid to statutory construction, it would necessarily be limited to the precise thing under discussion by the Senators, which was expressly the Japanese Treaty.

Indeed we gather from the excerpts quoted an argument to the contrary of what counsel contends in regard to the construction of the statute. For it appears that originally the Secretary of State proposed the amendment allowing the entry as follows:

> "An alien entitled to enter the United States under the provisions of a treaty."

Subsequently the Secretary was led to suggest a modification so as to read:

> "An alien entitled to enter the United States under the provisions of an *existing* treaty."

But the Senate in perfecting the act saw fit to still further modify the phrase by making it read as:

> "An alien entitled to enter the United States *solely to carry on trade,* under and in pursuance of the provisions of a present existing treaty of commerce and navigation",

thus expressly limiting the previous provision which might be said to recognize all the provisions of any treaty.

Had the relevant portion of the act stood alone in the employment of the phrase "coming solely to carry on trade" under and in pursuance of the provisions of the present existing treaty of commerce and navigation, it would not in view of its well recognized meaning be held to include members of the teaching profession. But this contention is reinforced and put beyond controversy when it is seen that Congress went further and made an express provision to cover the case of the teaching profession, and in order to prevent abuse saw fit to limit it to the class that would most likely be seeking to come in good faith to carry on such profession.

It is coming to be a well known custom for colleges and universities to receive what are called "exchange professors"; that is to say, a professor of celebrity will go from one country to fill a chair temporarily in a foreign university; a foreign professor comes to the United States for such purpose,

Doubtless the provision of the act was designed to facilitate that sort of thing which may be of great utility. But we have no such provision in the case of the ordinary primary school teachers. Indeed, to allow such to come *ad libitum,* being persons, perhaps, merely able to read and write, and thus claiming to be able to teach primary grades, would result practically in an influx of laborers.

Even, in line with existing treaties the Congress could enact legislation to prevent an abuse of the right to come into the United States under a treaty and thus define and limit terms. Indeed, under the cases, the so-called lottery vendor or peddler is not to be taken as a merchant and thus entitled to enter. Similarly, the Congress could without any breach of faith enact legislation limiting the persons entitled to come as teachers to those able to act as teachers in the full sense by accepting chairs in colleges and universities.

In any event, as we have seen, Congress did that very thing in precise, pertinent, clear language not needing construction.

The record will not bear counsel out in his contention that applicant comes into the United States to found or establish a school or college. He comes merely as a month to month employee of persons seeking to establish such school. Moreover a proper construction of the Immigration Acts, even in the light of existing treaties, would require the provision referred to to be construed as authorizing only per-

sons who are otherwise entitled to enter the United States to establish and maintain such schools and colleges.

It will further be noted that the clause of the Chinese treaty principally relied on ends with a so-called "favorite nation" clause. Such clause may extend rights in certain cases, but in other cases may limit them. It would not be contended in any quarter that the provisions of Subdivision (6) of Section 3 of the Immigration Act of 1924 would authorize the nationals of any and all countries to come in *ad libitum* under the claim of intending to carry on trade to the extent the applicant now contends. Indeed, the construction contended for would give to Chinese nationals a favorite status in seeking to come into the United States that would not be assigned to any other nationals.

CONCLUSION.

In conclusion it is submitted that we have the case of an alien immigrant of Chinese nativity ineligible to citizenship who came to the United States seeking entry as one who came to carry on the calling of a professor of a university or college. He made no other claim. Although he had so-called Section 6 Certificate, he also had the set of forms constituting a consular visa under the present Immigration Act. The latter would limit the former. Upon his examination he was found to be wholly

inadmissible under the status which he avowed. On an appeal to the Department his counsel undertook to show that the words of the provision embraced all teachers. Failing in that he has shifted his ground in court to make the claim that he was not an immigrant at all in that he comes solely to carry on trade. The statute will not bear a construction broad enough to include his situation. Nor is there any question of treaty really involved. The Congress could have regulated the entrance of persons claiming to come under the treaty so as to avoid abuse. Moreover Chinese persons have no treaty rights superior to those of other nations. As long as there was an endeavor to exclude Chinese persons alone, the courts might have been liberal in allowing entry under the favorite nation clause appearing in the treaty with China. But since the contention of appellant would now amount to a claim that Chinese persons are to be given greater rights than those of any other nationality, such a construction would not be so desirable.

In the two cases recently decided by the Supreme Court of the United States

Cheung Sum Shee v. Nagle;
Chang Chan v. Nagle,

do not contain anything in opposition to the view here contended for. It was conceived that the wives and families of merchants were admissible not under any right of their own but subordinate and appurtenant to the mercantile status of the husband

and father. Prior to the enactment of the Immigration Act of 1924, it had been construed that wives of merchants could enter with them, although not otherwise specified. The decisions admitting them as subordinate or appurtenant to the status of a merchant were known by Congress and no particular provision was made in respect thereto. There would be reason for giving the same construction.

Here the appellant does not seek to enter as subordinate to any other having the right of entry. He seeks to enter in his own right under a phrase which manifestly cannot include him.

Among the cases cited by appellant is the California case of

State v. Tagami, 69 Cal. Dec. 245.

By that case it was considered that under the treaty of 1911 between the United States and Japan one seeking to establish a "health resort and sanitorium" had the right to do so under the treaty. But in the first place the opinion proceeds largely upon the consideration of the bearing of the words "commerce" and "commercial" as used in the treaty under review, it being held that these terms were given a rather enlarged significance. But the discussion of Justice Richards in regard to the meaning of the terms "trade" and "commerce" does contain a significant concession, to wit,

> "Each of these terms has sometimes been subjected to two limitations which would dis-

> tinguish them from unskilled labor and even from agricultural employments on the one hand and *from professional employments* and from the exercise of the *fine arts on the other.*"

Referring to another case cited by appellant

Asakura v. Seattle, 265 U. S. 332,

it may be said that the business of pawnbroking, as defined in the Seattle Ordinance, manifestly would be that of one carrying on a commercial business and thus fall within any ordinary definition of "trade". We note, however, the significant concession at the end of the opinion, to wit,

> "The question in the present case relates solely to Japanese subjects who have been admitted to this country. We do not pass upon the right of admission or the construction of the treaty in this respect as that question is not before us and would require consideration of other matters with which it is not now necessary to deal."

The court was apparently at pains to discuss the character of the business of pawnbroking in order to show that it would fall within the designation "trade". In the instant case a construction is contended for broad enough to render unnecessary any analysis of a precise business which might be under consideration. Counsel would cover by the phrase "to carry on trade" practically every kind of a business or calling.

Nor do we find anything in the case of

Tatsukichi v. U. S., 260 Fed. 104,

in aid of counsel's contention. That case really de-

cides that a teacher is a member of a learned profession, a doctrine as to which we make no dispute. The case did not in any manner turn upon the provisions of the treaty. When the case arose there would have been no law excluding the Japanese applicant, except the contract labor act, and it was reasoned that such act did not exclude him. In the absence of restrictive legislation, of course, foreign nationals may enter the United States, whether the right be guaranteed by treaty or not. It is only in the case of legislation as it now exists, where none may enter except for example, "solely to carry on trade" as agreed to by treaty, that the question of the construction of the treaty would arise.

Indeed, it must be clear that considering the express language of the Immigration Act of 1924, and giving the language of Subdivision (6) of Section 3, and Subdivision (d) of Section 4, any reasonable construction, the case of petitioner cannot be brought within its terms.

Nor can it be said that such excluding construction of these provisions would conflict with the Chinese Treaty cited, or in any way amount to a breach of faith. Congress without such breach of faith would have the right, and it has availed itself of such right, to define terms or concepts made use of in the treaty to avoid abuse or to prevent fraudulent entry. The Congress did that very thing in enacting Section 2 of the so-called "McCreary

Act", the Act of November 3, 1893, (28 Stat. 7). In that Act the Congress adopted a definition of the word "merchant" which has been frequently applied by the courts.

In the case of

Lee Kan v. U. S., 62 Fed. 914,

one of the cases cited by petitioner, a reference is made to a certain statement of Mr. Geary on the floor of the House of Representatives, wherein it was stated that there was asked a definition of the word "merchant" "which be broad enough to protect every man legitimately engaged in that industry, and narrow enough to prevent the designation being used as an instrument of fraud by a class we do not desire". So in the instant case it is contended that a definition prescribing the qualifications of "teachers" who seek entrance so as to admit only regular teachers,—teachers fully qualified to carry on their profession to the fullest extent, the Congress was not only within its competency and power but would have committed no breach of faith. Indeed, it may be asserted with confidence that the design in the original treaty was to admit fully competent "teachers" and to bar others who might be shown to be able to read and write, for example, or to teach some kindergarten or primary school, but who would in effect be in no respect different from the great number of Chinese laborers.

In conclusion it is submitted that the legislation under review here is plain; the language does not need, nor admit of construction, and that assigning the only reasonable construction possible there would be essentially no breach of faith on the part of the United States. Such legislation would not be without precedent of long standing.

It is respectfully submitted that the order of the District Court should be be affirmed.

Respectfully submitted,

GEO. J. HATFIELD,
United States Attorney,
T. J. SHERIDAN,
Assistant United States Attorney,
Attorneys for Appellee.

No. 4679

United States

Circuit Court of Appeals

For the Ninth Circuit.

OLYMPIA CANNING COMPANY, a Corporation,

Plaintiff in Error,

vs.

THE UNION MARINE INSURANCE, LTD., a Corporation,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

FILED
SEP 29 1925
F. D. MONCKTON,
CLERK

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL.

Messrs. BOGLE, BOGLE & HOLMAN, Attorneys for Plaintiff in Error,
609–16 Central Building, Seattle, Washington.

Messrs. SHORTS & DENNY, Attorneys for Defendants in Error,
908 Alaska Building, Seattle, Washington. [1*]

In the Superior Court of the State of Washington for King County.

No. 172,142.

OLYMPIA CANNING COMPANY, a Corporation,

Plaintiff,

vs.

THE UNION MARINE INSURANCE COMPANY, LIMITED, a Corporation,

Defendant.

COMPLAINT.

Comes now the Olympia Canning Company, a corporation, plaintiff herein, and for its cause of action against the defendant herein alleges as follows:

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*Page-number appearing at foot of page of original certified Transcript of Record.

I.

That Olympia Canning Company, plaintiff herein, is and at all times hereinafter mentioned has been, a corporation, organized and existing under the laws of the State of Washington, with its principal place of business in the city of Olympia, Washington; that it has paid all fees due the State of Washington, including its last annual license fee.

II.

That defendant, The Union Marine Insurance Company, Limited, is and at all times hereinafter mentioned has been, a corporation, created and existing under the laws of the United Kingdom of Great Britain, with its principal office in the city of Liverpool; that it has complied with all the requirements of the insurance code of the State of Washington, and is privileged to sue, and subject to be sued, in the State of Washington under [2] and by virtue of the provisions of said state insurance code. That H. O. Fishback, State Insurance Commissioner of the State of Washington, is under the laws of said State of Washington, the duly authorized agent and attorney-in-fact of said defendant in said State of Washington, upon whom service of process can be made, with the same force and effect as service upon the defendant itself.

III.

That on the 8th day of June, 1922, the defendant, by its duly authorized agents, Drage-Graessner Co., entered into a contract of insurance with the plaintiff, being Open Policy No. 120 of said defendant

company, a copy of which is attached hereto, marked Exhibit "A," and made a part hereof; that the original contract of insurance between plaintiff and the defendant, dated June 8th, 1922, was subsequently modified by endorsements therein dated August 4, 1922, June 10, 1922, and October 28, 1922, copy of which endorsements are attached hereto, marked respectively Exhibits "B," "C" and "D," and made a part hereof; that by virtue of the terms of said contract of insurance, the defendant, in consideration of payment by plaintiff of the premiums at the rates therein stated, agreed to and did insure said plaintiff against loss of cannery supplies of every description and/or canned goods from Seattle to Olympia, Washington, and way ports and *vice versa,* on and after June 8, 1922, upon vessels operated by Sound Freight Lines, Inc., and/or Merchants Transportation Co., and/or P. S. Navigation Co., and/or any vessels operated by Captain F. E. Lovejoy; liability on any one vessel not to exceed the sum of Fifteen Thousand Dollars ($15,000.00), and by the endorsement dated October 28, 1922, attached hereto marked Exhibit "D," such liability was reduced to one-half interest in the plaintiff's goods on any one steamer, not to exceed Seven Thousand Five Hundred Dollars ($7,500.00). [3]

IV.

That among other provisions in the policy it was provided:

> "And touching the Adventures and Perils which the said Company is contented to bear

and does take upon itself in the Voyage so Insured as aforesaid they are of the Seas Men of War Fire Enemies Pirates Rovers Thieves Jettisons Letters of Mart and Counter Mart Suprisals Takings at Sea Arrests Restraints and Detainments of all Kings Princes and People of what Nation Condition or Quality soever Barratry of the Master and Mariners and of all other Perils Losses and Misfortunes that have or shall come to the Hurt Detriment or Damage of the aforesaid subject matter of this Insurance or any part thereof."

V.

That the contract of insurance hereinabove referred to was what is commonly known as an open policy of insurance, covering all shipments of the plaintiff from Seattle to Olympia, Washington, and *vice versa,* during the term of said policy, such shipments to be declared from time to time by the plaintiff to the defendant at their invoice value, and upon such declaration being made, to be covered by the terms of said contract of insurance.

VI.

That on or about the 29th day of September, 1923, and while said contract of insurance was in full force and effect, the plaintiff herein shipped on board the S. S. "Rubaiyat," operated by Captain F. E. Lovejoy, 1500 cases of canned goods, of the invoice value of $6,625.00, for transportation and carriage upon said vessel from Olympia, Washington, to Seattle, Washington, to be there delivered

to Anderson & Misken, and that said plaintiff promptly declared one-half the value of said shipment, or $3,312.50, to the defendant herein, being the amount at risk covered by the contract of insurance hereinabove referred to.

That on or about the 29th day of September, 1923, the said [4] plaintiff shipped on board said S. S. "Rubaiyat" 150 cases of canned goods, of the invoice value of $600.00, for transportation and carriage from Olympia, Washington, to Seattle, Washington, and there to be delivered to Griffith & Dunney Co., and plaintiff promptly declared one-half of said shipment, or $300.00, to the defendant, being the amount at risk covered by the policy hereinabove referred to.

That on September 29th, 1923, the plaintiff shipped on board said S. S. "Rubaiyat" 303 cases of Canned Goods, of the invoice value of $1,218.00, for transportation and carriage on said vessel from the port of Olympia, Washington, to Seattle, Washington, and there to be delivered to Fisher Brothers, and plaintiff promptly declared one-half of said shipment, or $609.00, to the defendant herein, being the amount at risk covered by the policy hereinabove referred to.

VII.

That at the time said S. S. "Rubaiyat" took said goods on board, and at the time said vessel sailed from the port of Olympia, she was in every respect seaworthy for a voyage from Olympia, Washington, to Seattle, Washington; that during the course of said voyage, said vessel, without any fault or neg-

lect on the part of the plaintiff herein, sunk, and together with her cargo, became a total loss. That by reason of the sinking of said vessel, the cargo on board thereof belonging to the plaintiff herein, and more particularly specified in the preceding paragraph hereof, became a total loss by reason of the perils specified in the contract of insurance hereinabove referred to.

VIII.

That plaintiff has made repeated demands of the defendant [5] for the payment of one-half of the invoice value of said goods lost as aforesaid, amounting to $4,221.00, but the said defendant has failed, neglected and refused to pay said sum, or any part thereof, to the plaintiff herein, contrary to the terms of its contract of insurance with plaintiff.

WHEREFORE, plaintiff prays for judgment against the defendant in the sum of Four Thousand Two Hundred Twenty-one Dollars ($4,221.00), together with interest thereon from the date of the loss of said goods, as aforesaid, and its costs and disbursements herein to be taxed.

BOGLE, MERRITT & BOGLE,
Attorneys for Plaintiff. [6]

State of Washington,
County of King,—ss.

Lawrence Bogle, being first duly sworn, on oath, deposes and says: That he is one of the attorneys for the plaintiff in the above-entitled action; that he has read the foregoing complaint, knows the contents thereof and believes the same to be true.

That he makes this verification for the reason that there is no officer of said plaintiff present within the county of King, State of Washington.

LAWRENCE BOGLE.

Subscribed and sworn to before me this 26th day of January, 1924.

[Seal] R. C. MILLER,

Notary Public in and for the State of Washington, Residing at Seattle. [7]

EXHIBIT "A."

THE UNION MARINE INSURANCE COMPANY, LIMITED.

OPEN POLICY

No. 120.

WHEREAS it has been proposed to the Union Marine Insurance Company, Limited, by Olympia Canning Company as well in their own name as for and in the name and names of all and every other person or persons to whom the subject matter of this Policy does may or shall appertain in part or in all to make with the said Company the Insurance hereinafter mentioned and described. Now this Policy Witnesseth that in consideration of the said person or persons effecting this Policy promising to pay to the said Company the sum of as may be come due as a premium at and after the rate of as per contract attached per cent. for such insurance the said Company takes upon itself the bur*th*en of such insurance to the amount of as per contract attached and promises and agrees with the Insured

their Executors Administrators and Assigns in all respects truly to perform and fulfill the Contract contained in the Policy. AND it is hereby agreed and declared that the said Insurance shall be and is an Insurance (lost or not lost) at and from as per contract attached

Particular average payable if amounting to three per cent; each shipping package to be considered as if separately insured. JAG.

In case of loss or damage to any part of a machine consisting when complete for sale or use of several parts this Company shall only be liable for the insured value of the part so lost or damaged and amounting to a claim under this contract. JAG.

In case of damage from perils insured against affecting labels only, loss to be limited to an amount sufficient to pay the cost of reconditioning, cost of new labels and relabeling the goods, provided the damage will have amounted to a claim under the terms of this policy. JAG.

AND it is also agreed and declared that the subject matter of this Policy as between the Insured and the Company so far as it concerns this Policy shall be and is as follows upon as per contract attached

Deck load is warranted free from Particular Average unless directly resulting from stranding, sinking, burning or collision with another ship or vessel; but including risk of jettison and washing overboard, irrespective of percentage. JAG.

Including (subject to the terms of the Policy) all risks covered by this policy from shippers or manufacturers warehouse until on board the vessel during transshipment if any and from the vessel whilst on quays, wharves or in sheds during the ordinary course of transit until safely deposited in consignees or other warehouse at destination named in policy. JAG.

It is understood and agreed that where this policy attaches on goods on railroads cars, the risks of fire derailment and collision only are covered and that where this policy attaches on goods while on any other land conveyance or while on docks, wharves, or elsewhere on shore, the risks of fire and flood (meaning rising navigable waters) only are covered; but dock risk in no event to exceed ten days. JAG. [8]

Warranted free of capture, seizure and detention and the consequences thereof or any attempt thereat *priacy* excepted and also from all consequences or riots and civil commotions, hostilities or warlike operations whether before or after declaration of war. Warranted free of loss or damage caused by strikers locked-out workmen or persons taking part in labor disturbances or riots or civil commotions.

General average payable as per Foreign Custom or per York-Antwerp Rules, if in accordance with the contract of affreightment.

In the event of the vessel making any deviation or change of voyage, it is mutally agreed that such deviation or change shall be held covered at a premium to be arranged, provided due notice be given by the assured on receipt of advice of such deviation or change of voyage.

Warranted free from particular average unless the vessel or craft be stranded, sunk or burnt, each craft or lighter being deemed a separate insurance.

Underwriters, notwithstanding this warranty, to pay for any damage caused by fire or by collision with any other ship, or vessel or with ice, or with any substance other than water, and any special charges for warehouse, rent, reshipping or forwarding, for which they would otherwise be liable. Also to pay the insured value of any package or packages, which may be totally lost in transshipment.

Grounding in the Columbia and/or Willamette Rivers or in the Panama Canal, or in the Suez Canal, or in the Manchester Ship Canal or its connections, or in the River Mersey above Rock Ferry Slip, or in the River Platte (above Buenos Ayres) or its tributaries, or in the Danube, Demerara, or Bilbao River on *on* the Yenikale or Bilbao Bar, shall not be deemed to be a stranding, but Underwriters to pay any damage or loss which may be proved to have directly resulted therefrom.

Warranted free from any claim consequent on loss of time, whether arising from a peril o*r* the sea or otherwise.

Including all risk of Craft and Boats to and from the Ship or Vessel.

All clauses annexed hereto or stamped or written hereon, including the clauses printed herein in italics, shall control other printed conditions inconsistent with the same.

(Under Deck) in the Ship or Vessel called the as per contract attached whereof —— is at present

Master or whoever shall go for Master in the said Ship or Vessel ———. AND the said Company promises and agrees that the Insurance aforesaid shall commence from the time when the Goods and Merchandise shall be laden on board the said Ship or Vessel Craft or Boat at as above and continue until the said Goods and Merchandise be discharged and safely landed at as above. AND that it shall be lawful for the said Ship or Vessel in the Voyage so Insured as aforesaid to proceed and sail to and touch and stay at any Ports or Places whatsoever without prejudice to this Insurance. AND touching the Adventures and Perils which the said Company is contented to bear and does take upon itself in the Voyage so Insured as aforesaid they are of the Seas Men of War*e* Fire Enemies Pirates Rovers Thieves Jettisons Letters of Mart and Counter Mart Surprisals Taking at sea Arrests Restraints and Detainments of all Kings Princes and People of what Nation Condition or Quality soever Barratry of the Master and Mariners and of all other Perils Losses and Misfortunes that have or shall come to the Hurt Detriment or Damage of the aforesaid subject matter of this Insurance or any part thereof. [9] AND in case of any Loss or Misfortune it shall be lawful to the Insured their Factors Servants and Assigns to sue labor and travel for in and about the Defence Safeguard and Recovery of the aforesaid subject matter of this Insurance or any part thereof without prejuci*de* to this Insurance the charge whereof the said Company will bear in proportion

to the sum hereby Insured. AND it is expressly declared and agreed that the acts of the Insurer or Insured in Recovering Saving or Preserving the Property Insured shall not be considered a waiver or acceptance of abandonment. AND it is declared and agreed that Corn Fish Salt Saltpetre Fruit Flour Rice Seeds Hides Skins and Molasses shall be and are warranted free from average unless general or the Ship be stranded sunk or burnt or unless caused by collision with another Ship or Vessel and that Sugar Tobacco Hemp and Flax shall be and are warranted free from average under Five Pounds per Centum and that all other Goods and also the Freight shall be and are warranted free from average under Three Pounds per Centum unless general of the Ship be stranded sunk or burnt or unless caused by collision with another Ship or Vessel.

In case of any lawful claim arising on this Policy it is agreed that the same shall be settled at Seattle, Wash. by The Union Marine Ins. Co., Ltd. it being understood that notice of such claim shall be given in writing by the holder of the Policy to the Company or its Agents as soon as practicable and that the adjustment and settlement thereof be made in conformity with the laws and customs of England but in the event of any difference of opinion arising between the said parties the settlement shall be referred to the Company in Liverpool.

It is warranted by the assured free from any liability for merchandise in the possession of any carrier or other bailee, who may be liable for any

loss or damage thereto, and any stipulation or agreement that such carrier or bailee shall have the benefit of this insurance shall avoid this Policy or Contract of Insurance. It is understood and agreed that the assured may accept, without prejudice to this insurance, the ordinary bills of lading issued by carrier, and it is agreed that the assured shall not enter into any special agreement with the carrier releasing them from their common law or statutory liability.

In the event of damage for which the Company may be liable the Company's Agents must be applied to for survey and in cases where the Company has no Agents at port of discharge Lloyd's Agents must be applied to. All claims for average should be accompanied by a Certificate from such Agents.

IN WITNESS WHEREOF, the Company has caused these presents to be signed by its General Agent in the City of San Francisco, State of California, but this policy shall not be valid unless countersigned by the duly authorized Agent of the Company at Seattle, Wash.

Countersigned at Seattle, Washington, this 8th day of June, 1922.

DRAGE-GRAESSNER CO.
By J. A. GRAESSNER,
Agent.

EDWIN C. A. KNOUTH. [10]

EXHIBIT "B."

Copy.

MARINE DEPARTMENT.

Endorsement.

Vessel "Sound Steamer" as per Contract.

It is warranted by the assured to report every shipment, with all its particulars, on the day of receiving advice thereof, or as soon thereafter as may be practicable, or within fifteen days from date of shipment, and should assured fail to so report any risk covered hereby, or to pay premium or premium notes when due, then the policy and entire insurance contemplated in the contract to which this endorsement is attached, whether reported or not, shall become null and void.

All other terms and conditions remaining unchanged.

_____,

Assured.

This slip is attached to and forms part of Open Policy No. 120 of the Union Marine Ins. Co., Ltd. issued to Olympia Canning Company Seattle, Wash., August 4th, 1922.

J. A. GRAESSNER COMPANY.

J. A. GRAESSNER,

Agents. [11]

EXHIBIT "C."

Copy.

MARINE DEPARTMENT.

Endorsement.

Vessel ———.

It is hereby understood and agreed that shipments per vessels operated by Capt. F. E. Lovejoy between Seattle and Olympia and way ports and *vice versa* are held covered at 1/8%.

All other terms and conditions remaining unchanged.

This slip is attached to and forms part of Open Policy No. 120 of the Union Marine Ins. Co., Ltd. issued to Olympia Canning Co. Seattle, Wash., June 10, 1922.

DRAGE-GRAESSNER CO.
By J. A. GRAESSNER,
Agents. [12]

EXHIBIT "D."

Copy.

MARINE DEPARTMENT.

Endorsement.

Vessel per Open Policy #120.

It is hereby understood and agreed that the liability of the Union Marine Insurance Co. Ltd., under the Open Policy to which this endorsement is attached, effective on all shipments made on and after November 1st, 1922, is reduced to one-half (1/2) in-

terest, but in no event to exceed $7500.00 part of $15,000.00 per any one vessel or in any one place at any one time unless otherwise agreed upon at the time of endorsement on policy.

All other terms and conditions remaining unchanged.

This slip is attached to and forms part of Open Policy No. 120 of the Union Marine Insurance Co., Ltd., issued to Olympia Canning Company, Seattle, Washington, October 28th, 1922.

J. A. GRAESSNER CO.
By J. A. GRAESSNER,
Agents.

OLYMPIA CANNING CO.
MARK EWALD,
Vice-Pres.

[Endorsed]: Filed Feb. 1, 1924. [13]

[Title of Court and Cause.]

ORDER OF REMOVAL.

This matter having come on to be heard upon the petition of the defendant above named for an order of the Court removing the above-entitled action from the above-entitled court to the District Court of the United States for the Western District of Washington, Northern Division, and it appearing that said petition is in due form and that with said petition the said petitioner did file a bond for removal, as required by law, and that prior to the filing of said petition and said bond notice of the

filing thereof was given the plaintiff, as provided by law, and the petition having come on to be heard at the time and place stated in said notice, and it appearing to the Court from the facts in said petition set forth and from the files and records in this cause, that said petition should be granted;

NOW, THEREFORE, IT IS HEREBY ORDERED that the above-entitled cause be and the same is hereby removed from the above-entitled court to the District Court of the United States for the Western District of Washington, Northern Division; that the said removal bond filed by petitioner herein be and the same is hereby accepted and approved; that the Clerk of this court is hereby directed to prepare a certified transcript of [14] the record in this action, as provided by law, to be filed in said District Court, and that no further proceedings be taken in this action in this court.

Dated, March 21st, 1924.

MITCHELL GILLIAM,
Judge.

[Endorsed]: Filed Mar. 21, 1924. [15]

[Title of Court and Cause.]

ANSWER.

Comes now the defendant above named, The Union Marine Insurance Company, Limited, a corporation, and for answer to plaintiff's complaint admits, denies and alleges as follows:

I.

Defendant admits the allegations set forth in Paragraph I of said complaint.

II.

Defendant admits the allegations set forth in Paragraph II of said complaint.

III.

Defendant admits the allegations set forth in Paragraph III of said complaint.

IV.

Defendant admits the allegations set forth in Paragraph IV of said complaint.

V.

Defendant admits the allegations set forth in Paragraph V of said complaint.

VI.

Defendant admits the allegations set forth in Paragraph VI of said complaint. [16]

VII.

Answering unto the allegations of Paragraph VII of said complaint, defendant admits that the S. S. "Rubaiyat" was seaworthy when she sailed from the port of Olympia on said voyage bound for Seattle, Washington; defendant further admits that during the course of said voyage said vessel without any fault or neglect on the part of the plaintiff sunk and, together with her cargo, became a total loss; defendant further admits that by reason of the sinking of said vessel the cargo on board her belonging

to plaintiff became a total loss; and defendant denies each and every other allegation in said paragraph set forth, and particularly denies that the cargo on board said vessel became a total loss by reason of any of the perils against which the same was insured, as specified in the contract of insurance between plaintiff and defendant mentioned in said complaint.

VIII.

Answering unto the allegations of Paragraph VIII of said complaint, defendant admits it has not paid plaintiff one-half of the invoice value of the goods lost, amounting to Forty-two Hundred and Twenty-one Dollars ($4221.00), or any part thereof; admits plaintiff has made demand for payment of same; and defendant denies each and every other allegation in said paragraph set forth.

FURTHER answering said complaint and as a defense to the allegations thereof defendant alleges:

I.

That said vessel, the S. S. "Rubaiyat," on September 29, 1923, sailed from the port of Olympia, Washington, bound for Seattle via Tacoma, having on board at the time of sailing from [17] Olympia the cargo mentioned in plaintiff's complaint; that said vessel on said voyage called at the port of Tacoma and there took on board additional cargo, to wit: gypsum in sax, plaster in sax and other cargo; that the cargo taken on board said vessel at Tacoma was so improperly stowed on the vessel as to make her topheavy, unstable, tender and unfitted to

continue the voyage; that a few minutes after leaving the dock at Tacoma bound for Seattle, she capsized and sunk and with her cargo became a total loss; that at the time the sea was calm and the weather fair; that the capsizing and sinking of said vessel and the loss of said cargo was caused solely by her said topheavy, unstable, tender and unfit condition, and was not caused by perils of the seas or any other perils or risks covered by the contract of insurance mentioned in plaintiff's complaint.

WHEREFORE, defendant prays that this action be dismissed and that it do have and recover from plaintiff its costs and disbursements herein and for such other relief as defendant may be entitled to receive.

SHORTS & DENNEY,
Attorneys for Defendant.

United States of America,
State of Washington,
County of King,
City of Seattle,—ss.

Bruce C. Shorts, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the defendant in the above-entitled action; that he has read the foregoing answer, knows the contents thereof and believes the same to be true.

That he makes this verification for the reason that [18] there is no officer of said defendant present within this judicial district.

BRUCE C. SHORTS.

Subscribed and sworn to before me this 8 day of April, 1924.

R. G. DENNEY,
Notary Public in and for the State of Washington,
Residing at Seattle.

Copy received. Date Apr. 12, 1924

BOGLE, MERRITT & BOGLE.
By ————.

[Endorsed]: Filed Apr. 12, 1924. [19]

[Title of Court and Cause.]

DEMURRER.

Comes now the plaintiff, Olympia Canning Company, a corporation, and demurs to the answer of the defendant herein on the ground that said answer does not set up facts sufficient to constitute a defense to the cause of action set forth in the complaint herein.

BOGLE, BOGLE & HOLMAN,
Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 29, 1925. [20]

[Title of Court and Cause.]

DECISION.

(On Demurrer to Aff. Defense.)

Filed April 14, 1925.

Plaintiff seeks to recover under contract of marine insurance for goods shipped aboard the S. S.

"Rubaiyat" on the voyage from Olympia to Seattle, the material part providing:

> "And touching the dangers and perils which said company is contented to bear and does take upon itself in the voyage so insured as aforesaid, they are of the sea * * * , and all other perils, losses and misfortunes that have or shall come * * * to the * * * damage of the aforesaid subject matter of this insurance or any part thereof.

All losses and customs are to be adjusted in accordance with the laws and customs of England.

The defendant admits the shipping of the cargo in harmony with the provisions of the policy; that the vessel was seaworthy when she sailed from the port of Olympia; that during the course of the voyage, without any fault or neglect on the part of the plaintiff the vessel sank, together with her cargo, and became a total loss; admits demand made for the loss by the plaintiff, refusal to pay, and as an affirmative defense states that the vessel sailed from the port of Olympia bound for Seattle via Tacoma, having on board the cargo set out in the complaint; that at the port of Tacoma additional cargo was taken which was improperly stowed, and the vessel, by reason thereof, became "topheavy, unstable, tender, and unfitted" to continue the voyage; that shortly after leaving the dock at Tacoma she capsized and sank and with her cargo became a total loss; that at the time the sea was calm, the weather fair, and the sinking was caused solely by her said topheavy, unstable, tender and unfit con-

dition, and was not caused by perils of the seas or any other perils or risks covered by the contract of insurance mentioned.

The plaintiff has demurred to the affirmative defense. [21]

Messrs. BOGLE, BOGLE & HOLMAN, of Seattle, Washington, Attorneys for Plaintiff.

Messrs. SHORTS and DENNEY, of Seattle, Washington, Attorneys for Defendant.

JEREMIAH NETERER, District Judge:

In the absence of adverse proof, it is presumed that the ship foundering at sea is because of the "peril of the sea." Rule 7, Sched. 1, Eng. Marine Act, 1906. Delanty vs. Yang Tsze Ins. Assn., 127 Wash. 238. Here the cause is known. The ship was seaworthy at the inception of the voyage. The issue is, was the loss due to a peril of the sea? There is a distinction between "damages arising on the sea" and "perils arising directly from the sea." Merrill vs. Arey, 17 Fed. Cas. 83. Judge Ware, in Merrill, *supra,* held that "dangers of the seas" included only those which accrued from the action of the elements and such as are incident to that cause, rather than to those arising on the seas. Circuit Judge Wallace, for the court, in The Warren Adams, 74 Fed. 413, said:

> "All marine casualties resulting from the violent action of the elements, as distinguished from their natural, silent influence, upon the fabric of the vessel; casualties which may, and not consequences which must, occur."

Circuit Judge Rogers, for the court, in The Giulia, 218 Fed. 744 at 746, said:

> "Perils of the seas are understood to mean those perils which are peculiar to the sea, and which are of an extraordinary nature or arise from irresistible force or overwhelming power, and which cannot be guarded against by the ordinary exertions of human skill and prudence."

Circuit Judge Hough, for the court, in The Rosalia, 264 Fed. 285, at 288, said:

> " * * * something so catastrophic as to triumph over those safeguards by which skillful and vigilant seamen usually bring ship and cargo to port in safety."

Circuit Judge Gilbert, for the court, in Aetna Ins. Co. et al. vs. Sacramento-Stockton S. S. Co., 273 Fed. 55, said at page 61:

> "We reach the conclusion that by the English law and practice a peril of the sea need not be extraordinary, in the sense of being catastrophic or necessarily the result of uncommon causes, and that severe storms, rough seas, and even fogs may be comprised in the perils of the seas."

Circuit Justice Washington, in U. S. vs. Hall, 26 Fed. Cas. 84 at 85, speaking of perils of the seas, said:

> " * * * It may safely be laid down that the accident which is attributable to this cause must happen without any fault or negligence of the master, and must occur at sea." [22]

The King's Bench Division, Feb. 19, 1924, 40 Times Law Reports, page 347, in an action to recover on a policy of insurance on a submarine "covering all and every risk" to the vessel whilst being broken up, during which breaking up, as the result of negligence the vessel sank to the bottom, the Court held:

> " * * * that the unintentional admission of sea water into a ship whereby she was caused to sink was a peril of the sea, and therefore, even if the policy was to be read as an ordinary marine policy, so that the Court must find something in the nature of a marine peril before the underwriters could be held liable, the plaintiffs were entitled to recover."

All matters in the affirmative defense well pleaded are admitted by the demurrer. Eliminating the conclusions from the issuable fact pleaded, it is admitted that there was nothing in the nature of a marine peril which caused the sinking. Ionides vs. Universal Marine Assn., 9 R. C. 351;—The Law Times Report, Vol. 8, new series 705,—is clearly distinguishable from the issue here, as is also P. Samuel & Co. vs. Dumas, 26 Eng. Com. Cases, 239,—93 Law Journal Rep. 415, King's Bench Division 1924, in which the Court held scuttling a ship not a peril of the sea. The Court also said in this case all storms are fortuitous, and "ordinary action of the waves is not." In Redman vs. Wilson, 14 M. & W. 476, 153 Eng. Rep. 562, Exchequer Book 9, the vessel was unskillfully loaded and sprung a leak, but before stranding was in a tornado, and the Court

decreed recovery for the loss suffered after the tornado.

A fortuitous event is the happening of that which we cannot resist. Viterbo vs. Friedlander, 120 U. S. 707. A happening independently of human will or means of foresight, resulting from unavoidable physical causes, Webster.

If the vessel had sunk at the dock by reason of overloading, or improper loading with "gypsum in sax, plaster in sax and other cargo," it could not be seriously contended that the sinking was because of a peril of the sea. The G. R. Booth, 171 U. S. 450. The loading being of such a character that within "a few minutes" after leaving the dock she sunk in a calm sea, the weather being fair, by reason of the tender condition occasioned by the improper loading, the same result follows. The policy in issue is the ordinary marine policy, and "the Court must find something in the nature of a marine peril" before recovery may be had,—40 Times Law Reports, *supra,*—and from the admitted facts this cannot be done. The phrase *"all other perils,"* etc., in the policy must refer to the "perils of the seas" and be held to have no effect, since there is no doubt as to the "specific causes of loss." Anthony vs. Aetna Ins. Co., 1 Fed. Cases 1086.

Demurrer is overruled.

NETERER,
United States District Judge.

[Endorsed]: Filed Apr. 14, 1925. [23]

[Title of Court and Cause.]

ORDER OVERRULING PLAINTIFF'S DEMURRER TO DEFENDANT'S ANSWER.

This matter having come on to be heard in open court upon plaintiff's demurrer to defendant's answer, plaintiff appearing by Messrs. Bogle, Bogle & Holman, its attorneys, and defendant appearing by Messrs. Shorts & Denney, its attorneys; the Court having heard the arguments of the attorneys for both plaintiff and defendant, and having duly considered the memorandum briefs filed by both parties, and having thereafter on April 14, 1925, filed a memorandum of the Court's decision overruling said demurrer,

NOW, THEREFORE, pursuant to said decision, it is hereby ORDERED, ADJUDGED and DECREED that plaintiff's said demurrer to the affirmative defense as set forth in defendant's answer, be and the same is hereby overruled.

Plaintiff excepts. Exception allowed.

Done in open court this 13 day of July, 1925.

JEREMIAH NETERER,
Judge.

[Endorsed]: Filed Jul. 13, 1925. [24]

[Title of Court and Cause.]

REPLY.

Comes now the plaintiff above named and replying to the allegations of the affirmative defense of the defendant above named, admits, denies, and alleges as follows:

I.

Plaintiff admits that the S. S. "Rubaiyat" on September 29, 1923, sailed from the port of Olympia, Washington, bound for Seattle via Tacoma, having on board at the time of sailing from Olympia the cargo mentioned in the plaintiff's complaint herein; admits that said vessel during the course of said voyage called at the intermediate port of Tacoma and there took on board additional cargo, to wit, gypsum in sax, plaster in sax, and other cargo; admits that a short time after leaving the dock at Tacoma, bound for Seattle, said vessel capsized and sunk and together with her cargo became a total loss. Except as herein admitted, the plaintiff denies each and every allegation in said affirmative defense contained.

WHEREFORE, plaintiff, having fully answered the allegations of said affirmative defense, prays that it have judgment herein against the defendant for the amount prayed for in its complaint herein.

BOGLE, BOGLE & HOLMAN,

Attorneys for Plaintiff. [25]

United States of America,
Western District of Washington,
Northern Division,—ss.

Lawrence Bogle, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the plaintiff in the above-entitled action; that he has read the foregoing reply, knows the contents thereof, and believes the same to be true. That he makes this verification for the reason that there is no officer of said plaintiff present within the Western District of Washington, Northern Division.

LAWRENCE BOGLE.

Subscribed and sworn to before me this 9th day of July, 1925.

[Seal] D. T. CHILD,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed Jul. 14, 1925.

Copy of attached reply received and due service thereof admitted upon July 9, 1925.

SHORTS and DENNEY,
Attorney for Defendant. [26]

[Title of Court and Cause.]

STIPULATION WAIVING JURY.

The undersigned attorneys of record for plaintiff and defendant above named hereby stipulate and agree that the issues of fact in the above-entitled cause may be tried and determined by the Court without the intervention of a jury.

Dated, Seattle, Washington, July 13, 1925.

BOGLE, BOGLE & HOLMAN,
Attorneys for Plaintiff.

SHORTS and DENNEY,
Attorneys for Defendant.

[Endorsed]: Filed Jul. 22, 1925. [27]

[Title of Court and Cause.]

DECISION.

Filed July 15, 1925.

Messrs. BOGLE, BOGLE & HOLMAN, of Seattle, Wash., Attorneys for Plaintiff.

Messrs. SHORTS and DENNEY, of Seattle, Wash., Attorneys for Defendant.

JEREMIAH NETERER, District Judge.

From a consideration of all of the evidence in this case and the law applicable thereto, the conclusion to my mind is inevitable that a decree must be entered for the respondent, and formal order may be presented for signature.

NETERER,
United States District Judge.

[Endorsed]: Filed Jul. 15, 1925. [28]

[Title of Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This cause having come on to be tried and determined upon the merits on July 13, 1925, before the Hon. Jeremiah Neterer, Judge of the above-entitled court, without the intervention of a jury (a jury having been expressly waived by stipulation of the parties), upon the issues framed by plaintiff's complaint, defendant's answer and plaintiff's reply, plaintiff appearing by its attorneys of record, Messrs. Bogle, Bogle & Holman, the defendant appearing by its attorneys of record, Messrs. Shorts & Denney, witnesses having been duly sworn and examined and other evidence introduced on behalf of both parties, the Court, having heard and considered the same and the arguments of counsel, and being fully advised in the premises, does hereby make the following

FINDINGS OF FACT.

I.

That Olympia Canning Company, plaintiff herein, is and at all times hereinafter mentioned has been, a corporation, organized and existing under the laws of the State of Washington, with its principal place of business in the city of Olym-

pia, Washington; that it has paid all fees due the State of [29] Washington, including its last annual license fee.

II.

That defendant, The Union Marine Insurance Company, Limited, is and at all times hereinafter mentioned has been, a corporation, created and existing under the laws of the United Kingdom of Great Britain, with its principal office in the city of Liverpool; that it has complied with all the requirements of the insurance code of the State of Washington, and is privileged to sue, and subject to be sued, in the State of Washington under and by virtue of the provisions of said State Insurance Code.

III.

That on the 8th day of June, 1922, the defendant entered into a contract of insurance with the plaintiff, being Open Policy No. 120 of said defendant Company, a copy of which is attached to plaintiff's complaint as Exhibit "A"; that the contract was subsequently modified by endorsements attached to plaintiff's complaint as Exhibits "B," "C" and "D"; that by virtue of said contract of insurance, defendant insured plaintiff against loss caused by certain hazards or perils in said policy specified on canned goods shipped by plaintiff from Olympia to Seattle, Washington, on certain vessels, including the M. S. "Rubaiyat," liability for loss on account of any shipment on any one vessel to be limited to one-half of plain-

tiff's interest in such goods and not to exceed $7,500.00.

IV.

That among other provisions in the policy it was provided:

> "AND touching the Adventures and Perils which the said Company is contented to bear and does take upon itself in the Voyage so Insured as aforesaid they are of the Seas Men of War Fire Enemies Pirates Rovers Thieves [30] Jettisons Letters of Mart and Counter Mart Surprisals Takings at Sea Arrests Restraints and Detainments of all Kings Princes and People of what Nation Condition or Quality soever Barratry of the Master and Mariners and of all other Perils Losses and Misfortunes that have or shall come to the Hurt Detriment or Damage of the aforesaid subject matter of this Insurance or any part thereof."

V.

That on or about the 29th day of September, 1923, and while said contract of insurance was in full force and effect, the plaintiff, at Olympia, Washington, shipped on board said M. S. "Rubaiyat" for transportation and carriage from Olympia to Seattle (via Tacoma) 1953 cases of canned goods of the invoice value of $8,443.00, and plaintiff promptly declared one-half of the value of said shipment, to wit: the sum of $4,221.00, to defendant, said sum being the amount at risk under said contract of insurance.

VI.

That at the time said vessel sailed from Olympia with said cargo on board she was in every respect seaworthy for a voyage from Olympia to Seattle.

VII.

That said vessel was of the registered length of 59.6 ft., breadth, 22.4 ft. and depth, 8.5 ft., and her registered net tonnage was seventy-four tons, dead weight about 130 tons and she had a sharp head and a transom stern. That in said vessel was an elevator, located slightly forward of amidships, said elevator consisting of a platform about 8 ft. wide by 16 ft. long, which elevator operated between four upright posts, one at each corner, extending from the floor of the vessel upward a considerable distance above the upper deck, said platform being raised and lowered by means of cables operated through pulleys located on [31] the superstructure resting upon the upper ends of said posts; that said vessel had a main deck and an upper deck, in both of which were openings the size of said elevator platform; that said elevator was used for handling cargo to the lower hold and to both decks; that the captain's room, the pilot-house and the life-boats were all located on the upper deck aft of the elevator.

VIII.

That when said vessel left Olympia she had on board about sixty tons, dead weight, of canned goods and some other cargo of household goods,

a portion of which was located on the upper deck forward of the elevator. That after sailing from Olympia said vessel called at the port of Tacoma and there took on board sixty-two additional tons of cargo, consisting of gypsum in sax and plaster in sax. That on sailing from Tacoma she had on board one hundred twenty-two tons of cargo, of which ten and one-half tons were on the upper deck forward of the elevator, twenty-one tons were in the lower hold, and ninety and one-half tons were on the main deck. That the elevator platform was flush with the floor of the upper deck and constituted a part of such floor and no cargo was stowed beneath such platform. That she had 15 tons of rock ballast alongside her keel, and 500 gallons of fuel oil and 140 gallons of water in steel tanks below the main deck.

IX.

That when said vessel left Tacoma she was so heavily loaded that at her ports she had only about six inches freeboard which was the maximum she could be put down with safety, and she was deeper down on this voyage than on any previous voyage; that there was ample room below to have put all the cargo that was stowed on the upper deck. [32]

X.

That as said vessel backed out of her dock in the Waterway at Tacoma, she encountered the wash or displacement waves of the steamer "Indianapolis," which last-named vessel had previ-

ously entered the waterway and was then coming to her mooring at the municipal dock on the opposite side of the waterway; that such wash or displacement waves did not cause any undue rolling or indicate crankiness or tenderness of the vessel; that said vessel then proceeded for about fourteen minutes and for a distance of about two and one-half miles, and without meeting any other vessel, to a point in Commencement Bay, where certain well-known tidal currents exist and a current caused by the waters of the Puyallup River emptying into said Bay. Upon reaching this point her master brought her wheel over one-half a point to change her course, whereupon the vessel suddenly took a list to port, then gradually went over to starboard, filled up with water, capsized and sunk, both vessel and cargo becoming a total loss.

XI.

That at the time the surface of the water was calm and the weather was fair and clear. That the listing, capsizing and sinking of the vessel was caused by her being in so topheavy, unstable, tender and unfit condition, due to the improper manner in which the cargo taken on at Tacoma was stowed aboard her as to be unable to withstand the effect of said tidal or cross-currents and was not caused by perils of the seas, or any other perils or risks covered by the contract of insurance hereinbefore mentioned.

Done in open court this 24 day of July, 1925.

JEREMIAH NETERER,
Judge.

The Court, having made and entered the foregoing findings of fact, now makes the following [33]

CONCLUSIONS OF LAW.

I.

That defendant is not liable to plaintiff under said contract of insurance for the loss of plaintiff's said goods.

II.

That a decree should be entered herein dismissing this action with prejudice and awarding to defendant its costs and disbursements herein.

Done in open court this 24th day of July, 1925.

JEREMIAH NETERER,
Judge.

Plaintiff excepts to findings of fact No. IX and XI upon the ground that the same are not supported by the evidence herein and that the evidence is contrary thereto, which exceptions are hereby allowed.

JEREMIAH NETERER,
Judge.

Plaintiff excepts to Conclusions of Law No. I upon the ground that the same is not sustained by the evidence but is contrary thereto.

Plaintiff excepts to Conclusion of Law No 2 upon the ground that the same is not sustained by the evidence, or findings herein and is contrary thereto and erroneous.

Foregoing exceptions allowed this 24th of July, 1925.

JEREMIAH NETERER,
Judge.

[Endorsed]: Filed Jul. 24, 1925. [34]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 8,439.

OLYMPIA CANNING COMPANY, a Corporation,

Plaintiff,

vs.

THE UNION MARINE INSURANCE COMPANY, LIMITED, a Corporation,

Defendant.

DECREE.

This cause having come on to be tried and determined upon the merits on July 13, 1925, before the Hon. Jeremiah Neterer, Judge of the above-entitled court, without the intervention of a jury (a jury having been expressly waived by stipulation of the parties), upon the issues framed by plaintiff's complaint, defendant's answer and plaintiff's reply, plaintiff appearing by its attorneys of record, Messrs. Bogle, Bogle & Holman, the defendant appearing by its attorneys of record, Messrs. Shorts & Denney, witnesses having been

duly sworn and examined and other evidence introduced on behalf of both parties, the Court, having heard and considered the same and the arguments of counsel, and having made and entered its findings of fact and conclusions of law herein, and being now fully advised in the premises:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, in conformity with said findings of fact and conclusions of law, that the above-entitled action be and the same is hereby dismissed with prejudice, and that defendant do have and recover from plaintiff its costs and disbursements to be taxed herein.

Done in open court this 24th day of July, 1925.

JEREMIAH NETERER,
Judge. [35]

Plaintiff excepts to the foregoing decree and its exception is allowed this 24th day of July, 1925.

JEREMIAH NETERER,
Judge.

[Endorsed]: Filed Jul. 24, 1925. [36]

[Title of Court and Cause.]

PETITION FOR WRIT OF ERROR.

Olympia Canning Company, a corporation, the plaintiff in the above-entitled action, conceiving itself aggrieved by the decision and judgment of this Court made and entered against it and in favor of the defendant, The Union Marine Insurance Company, Ltd., a corporation, on July 24, 1925, and the findings of fact and conclusions of law made and entered by said Court on the same day, and having severally taken objections and exceptions to said judgment, findings of fact and conclusions of law, and having duly noted and set forth the said objections in its assignments of error filed herewith, respectfully petitions the above-entitled court for an order allowing the said plaintiff to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignments of error filed herewith, and further respectfully petitions said Court for an order fixing the amount of security which said plaintiff shall give and furnish in said writ of error, and that upon giving such security, all further proceedings in the above-entitled cause be stayed until the dismissal of the said writ of error by the said United States Circuit Court of Appeals.

Relative to this petition, said Olympia Canning Company, a corporation, respectfully shows that by reason of the premises [37] manifest error has happened to the great damage of the plaintiff herein,

and that plaintiff has filed herewith its assignments of error upon which it relies and will urge in said United States Circuit Court of Appeals.

WHEREFORE, Said plaintiff, Olympia Canning Company, a corporation, prays that a writ of error may issue out of the United States Circuit Court of Appeals for the Ninth Circuit to the above-entitled court for the correction of the error so complained of and that a transcript of the record of proceedings, papers, and all things concerning same, upon which such judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, to the end that said judgment be reversed and that said plaintiff recover judgment as demanded in its complaint.

BOGLE, BOGLE & HOLMAN,
Attorneys for Plaintiff.

Due service of the within petition for writ of error is admitted this 30th day of July, 1925.

SHORTS and DENNEY,
Attorneys for Defendant.

[Endorsed]: Filed Jul. 30, 1925. [38]

[Title of Court and Cause.]

ASSIGNMENTS OF ERROR.

Comes now the above-named plaintiff, Olympia Canning Company, a corporation, appearing by Bogle, Bogle & Holman, its attorneys of record, and says that the judgment made and entered in the above-entitled cause on July 24, 1925, in favor of the defendant and against the plaintiff is er-

roneous, and against the just rights of said plaintiff, and files herein, together with its petition for a writ of error from said judgment the following assignments of error which said plaintiff avers occurred upon the trial of said cause:

I.

The Court erred in entering judgment in favor of the defendant herein and against the plaintiff herein.

II.

The Court erred in making Finding of Fact No. IX on the ground that no competent evidence was offered or received at the trial tending to prove the allegations of said finding of fact No. IX, and that said allegations of said findings of fact were and are against the preponderance of the evidence.

III.

The Court erred in making Finding of Fact No. XI on the [39] ground that no competent evidence was offered or received at the trial tending to prove the allegations of said findings of fact No. XI and that said allegations of said findings of fact were and are against a preponderance of the evidence.

IV.

The Court erred in making and entering the first conclusion of law herein and the whole thereof for the reason that said conclusion is not supported by the findings of fact or the evidence herein.

V.

The Court erred in making and entering the second conclusion of law and the whole thereof for the reason that said conclusion is not supported by the findings of fact or the evidence herein.

VI.

The Court erred in making and entering an order herein overruling the plaintiff's demurrer to the defendant's affirmative answer herein.

VII.

The Court erred in holding that the loss of the plaintiff's goods was not caused by a peril of the sea within the terms of the policy issued by the defendant.

VIII.

The Court erred in refusing to enter judgment herein in favor of the plaintiff and against the defendant herein.

BOGLE, BOGLE & HOLMAN,
Attorneys for Plaintiff.

Due service of the within assignments of error is admitted this 30th day of July, 1925.

SHORTS and DENNEY,
Attorneys for Defendant.

[Endorsed]: Filed Jul. 30, 1925. [40]

[Title of Court and Cause.]

ORDER ALLOWING WRIT OF ERROR.

On this 30th day of July, 1925, came the plaintiff, Olympia Canning Company, appearing by its attorneys, Bogle, Bogle & Holman, and filed herein and presented to the court its petition praying for the allowance of a writ of error from the decision and judgment of this court made and entered in this cause July 24, 1925, in favor of the defendant and against the plaintiff, together with its assignments of error intended to be urged by the plaintiff within due time and also praying that a transcript of the record of proceedings and papers upon which the said judgment herein was entered, duly authenticated, may be sent to said Circuit Court of Appeals for the Ninth Circuit; and also praying that an order be made fixing the amount of the security which the said plaintiff shall give and furnish upon said writ of error, and that upon the giving of said security, all further proceedings in this court be suspended and stayed until a determination of the said writ of error by the said Circuit Court of Appeals, and that such other and further proceedings may be had as may be proper in the premises;

Now, therefore, in consideration thereof, this Court does allow said writ of error upon the said plaintiff filing with the Clerk of this court a good and sufficient bond in the sum of [41] $250.00, to the effect that if the said plaintiff shall prosecute the said writ of error to effect and answer all dam-

ages and costs, if plaintiff fails to make good its plea, then said bond to be void; otherwise to remain in full force and virtue. Said bond is to be approved by this court; and

IT IS NOW ORDERED, That all proceedings in this court and cause are hereby suspended and stayed until the determination of said writ of error by said Circuit Court of Appeals for the Ninth Circuit, and the said bond shall operate as a supersedeas bond.

Dated this 30th day of July, 1925.

JEREMIAH NETERER,
Judge.

Approved as to form.

SHORTS and DENNEY,
Attorneys for Defendant.

Due and sufficient service by copy of the foregoing order allowing writ of error is acknowledged this 30th day of July, 1925.

SHORTS and DENNEY,
Attorneys for Defendant.

[Endorsed]: Filed Jul. 30, 1925. [42]

[Title of Court and Cause.]

BOND ON WRIT OF ERROR.

KNOW ALL MEN BY THESE PRESENTS, That Olympia Canning Company, a corporation, principal, and American Surety Company of New York, a corporation organized under the laws of the State of New York and authorized to transact

business in the State of Washington, surety, are held and firmly bound unto The Union Marine Insurance Company, Ltd., a corporation, the defendant above named, in the sum of ($250.00) Two Hundred Fifty Dollars, to be paid unto the said The Union Marine Insurance Company, Ltd., for which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our successors and assigns, firmly by these presents.

Sealed with our seals and dated this 30th day of July, 1925.

WHEREAS, the above-named principal is prosecuting a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment in the above-entitled cause entered by the District Court of the United States for the Western District of Washington, Northern Division on July 24, 1925.

NOW, THEREFORE, the condition of this obligation is such that if the above-bounden principal shall prosecute its said writ of error to effect and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise [43] to be and remain in full force and effect.

OLYMPIA CANNING COMPANY.
By BOGLE, BOGLE & HOLMAN,
Its Attorneys.
Principal

AMERICAN SURETY COMPANY OF NEW YORK.

By A. E. KRULL,
A. E. KRULL,
Resident Vice-President.

[Seal] Attest: E. F. KIDD,
E. F. Kidd—Resident Assistant Secretary,
Surety.

Approved as to form and amount this 30 day of July, 1925.

SHORTS and DENNEY,
Attorneys for Defendant.

Approved as to form and amount this 30th day of July, 1925.

JEREMIAH NETERER,
Judge.

[Endorsed]: Filed Jul. 30, 1925. [44]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED, That on the 13th day of July, 1925, at Seattle, Washington, the above-entitled action came on for trial before the Honorable Jeremiah Neterer, District Judge,—the plaintiff appearing by Messrs. Bogle, Bogle & Holman, its attorneys, and defendant appearing by Messrs. Shorts & Denney, its attorneys, and by written stipulation filed in the above-entitled court, a jury having been waived, said cause was tried to the court.

(Testimony of George J. Ryan.)

Whereupon, the following proceedings were had:

The policy of insurance issued by the defendant to the plaintiff, upon which the said suit was based, was received in evidence as Plaintiff's Exhibit No. 1.

Whereupon the following testimony was offered:

TESTIMONY OF GEORGE J. RYAN, FOR PLAINTIFF.

GEORGE J. RYAN, having been called by plaintiff as a witness, being first duly sworn, stated:

That he was a master mariner and had been master of the steamer "Rubyiat" for a period of five and one-half months and was master at the time she sank in Tacoma Harbor. That he was familiar with the manner in which she was loaded on this particular voyage, and that she had been loaded with as much cargo on [45] the upper deck on previous voyages.

(Plaintiff's Exhibit 2, being the chart of Commencement Bay, was offered in evidence without objection.)

The witness drew with a blue pencil on said chart the course of the "Rubiayat" from the time she left the dock at Tacoma Harbor until she foundered. Point "A" being the dock from which she departed, point "C" where she changed her course in backing out of the waterway, and point "B" where she foundered. The witness testified that in backing out of the waterway and turning around, the steamer "Indianapolis" passed about fifty feet off. That said steamer "Indianapolis" threw up

(Testimony of George J. Ryan.)

a displacement wave of about a six foot swell which struck the "Rubiayat" broadside; that said displacement wave did not affect the "Rubiayat"; that said vessel did not indicate any crankiness or tenderness at the time of passing the "Indianapolis" or at any time until immediately prior to her foundering. The first indication of danger was when the vessel took a list to port, and the witness, who was at the wheel, gave her a starboard helm to meet the list to port. The vessel thereupon took a list to starboard and foundered. That after backing out from the dock, the vessel had proceeded about two and one-half miles up to the time she foundered, and that there were no heavy seas at said time.

Cross-examination.

On cross-examination, the witness testified: That the waterway in Tacoma from which they departed was about one hundred feet wide; at the time the "Indianapolis" passed the "Rubiayat," she was slowed down to make a landing at the municipal dock directly opposite; that said vessel throws from a four to a six-foot wave when going full speed, which would follow her into the waterway. That at the entrance to the waterway is about half a mile from the point [46] where the "Indianapolis" passed the "Rubiayat"; she had slowed down.

The witness further testified that the "Rubiayat" was 65 feet in length over all, 59′6″ between perpendiculars; 22′4″ in width and 8′4″ in depth, with a net tonnage of 74 tons.

TESTIMONY OF FRANK C. LOVEJOY, FOR PLAINTIFF.

FRANK C. LOVEJOY, being sworn as a witness for the plaintiff, testified:

That he was the owner of the "Rubiayat," had built said vessel and to a great extent had designed her. That he has held a master's license for fifteen years, operated extensively in Puget Sound waters for about eleven years as master and had operated the steamer "Rubiayat." That he was familiar with the manner in which she was loaded at the time she left Tacoma prior to her foundering; that on previous trips when he was operating the "Rubiayat," he had had more cargo on her upper decks than she had at the time she foundered, and that she had indicated no particular tenderness under such circumstances.

"Q. Captain, are you familiar with the tides and currents in Commencement Bay?

A. Yes, sir.

Q. Just state to the Court what the currents there are, the action of the tide in Commencement Bay, referring to this Plaintiff's Exhibit 2.

A. The currents as a whole are circular in motion in Commencement Bay, due to the tide ebbing down through by Point Defiance, and down through the West Pass, and the flood coming through the East Pass, or Vashon Island, so that at every flood there is a clockwise motion of the tides in the bay there at Tacoma, probably eighty per cent of the time, except near slack water, that is, both slack high

(Testimony of Frank C. Lovejoy.)

and low, the tides are flowing in one direction from about Sperry's Mill, or the Terminal Docks, out towards Point Defiance, Old Town, out that way. The tide is a good eighty per cent of the time in the one direction, north. There is a break at the edge of this circle, which is about off the Terminal Docks, or near where the "Rubiayat" was sunk, where there is three separate currents entering into it. One is this circular current, the other is the water from the water at Tacoma, where the regular [47] boats land, and the other is a current from the river. It is uncertain as to just where that is. It will vary back and forth over an area of a mile or so, but those familiar with towing logs in there watch the boats come in. It is very conspicuous, this large circle in the bay, and a boat will get at least three or four miles out of the shortest route between Point Defiance and the mills in making the mills, due to this tide, and will do it even though to all appearances there should be a fair tide.

Q. What effect does the current coming out of the waterway, and this river—is that what you have just described?

A. Yes, sir. It would be uncertain as to just what it would be. There would be cross currents, and a tendency to whirlpool. While they are not very strong they are noticeable to anyone steering a boat through them.

The COURT.—What effect does it have on the boat?

(Testimony of Frank C. Lovejoy.)

A. To make her loose or steer crooked.

The COURT.—How is that?

A. To make her either loose or steer crooked; that is, she would tend to deviate from her course when meeting this, or else list over a little.

Q. Of course you are familiar with the construction of the "Rubiayat," her design, etc.?

A. Yes, sir.

Q. And you are familiar with the manner in which she was loaded on the day she foundered?

A. Yes, sir; I think I am.

Q. Considering the fact that she made her turn in the waterway, and encountered the displacement waves from the "Indianapolis" without any serious effect on her, and that she proceeded approximately two miles thereafter under full speed without indicating any crankiness, what would you say would be at least one of the contributing factors to the sudden list and foundering of this vessel?

Mr. SHORTS.—I object to that upon the ground that it calls for the conclusion of the witness. The witness was not present aboard the vessel at the time, and any information he can have is purely hearsay.

Mr. BOGLE.—I am not asking him for the fact; I am asking him as an expert, from his knowledge of the tidal conditions in that harbor, and the admitted facts with reference to this vessel.

The COURT.—Let it go in the record. You may answer.

A. She undoubtedly, or in my mind met with

(Testimony of Frank C. Lovejoy.)

factors other than wholly the loading of the vessel. That is, she met currents which caused her to take a list there, which was the real start of her capsizing."

Cross-examination.

On cross-examination, the witness testified: That he was not present in Tacoma when the vessel was loaded and only knows as to the manner of loading from what others have told him. That his knowledge of tidal conditions in Tacoma [48] Harbor is based upon his personal observations; that fast boats have no occasion to observe these tides and currents but that it is fair to assume that those in charge of the "Rubiayat" and boats her size would have knowledge of the condition of the tides and currents in said harbor. That the "Rubiayat" has an elevator 16'3" by 7'6" which is raised up and down in loading cargo; that there is a steel stanchion at each corner of the elevator weighing approximately 470 pounds each. That the elevator is raised by compressed air from the main engine which is located in the lower hold; that the platform is elevated by cables from the top. That the hoisting apparatus was in the lower hold with wires leading from the drum over the top of the stanchions and down over the four corners; that there were wheels and pulleys at the top of the stanchions, which the wires would run over in order to raise the elevator up and down.

"Q. What houses, if any, were there upon the upper deck?

(Testimony of Frank C. Lovejoy.)

Mr. BOGLE.—In order to preserve the record I think I shall object to that as incompetent and immaterial, in view of the admission as to seaworthiness. She was seaworthy at the time she left on the voyage.

The COURT.—I think the objection is good, but I will let it go in the record. The Court of Appeals may not feel that way.

A. A house aft of the elevator with a clearance of six feet two, single seal, about 7/8, and the wall is—I think the Texas, which is included within the wheelhouse was on her.

Q. Then the vessel had a main deck?

A. Yes, sir; and a house over the entire main deck.

Q. And below the main deck was the lower hold?

A. The lower hold, yes, sir, for freight and machinery."

Thereupon, the defendant offered in evidence certified copy of the vessel's documents for the sole purpose of showing her length and other dimensions, which document was received as Defendant's Exhibit "A-1."

The plaintiff having rested, the following proceedings were had:

"The COURT.—Any further testimony?

Mr. BOGLE.—That is all, if your Honor please.

* * * * * * * * * * *

Mr. SHORTS.—Will you pardon me; the Court asked if there was any other evidence, and I might state this, that [49] we have entered into a stipu-

lation, as Mr. Bogle has stated, to the effect that the testimony of the witnesses who were examined before the inspectors may be introduced in evidence in this case with the same force and effect as though the witnesses were here and testifying.

Mr. BOGLE.—Yes.

Mr. SHORTS.—I do not know whether it is necessary to enter into the stipulation and then make it evidence or not, but perhaps I had better do it.

The COURT.—You might introduce it.

Mr. BOGLE.—We both offer it as evidence in this case.

Mr. SHORTS.—Yes; we are offering this as evidence.

The COURT.—Very well.

* * * * * * * * * * *

The COURT.—I think the thing that will determine the case will be this, in my judgment, in my recollection of the case as heretofore submitted; did the currents that were created, as testified to by the last witness on the stand, did they create such a condition as to be a peril within the provisions of the policy. This boat having left the wharf and ran about two miles and a half into the place where this witness says these currents were, would the condition of those currents, the operation of them upon the vessel, create a peril within the policy. That is about the only thing in this case, in my judgment.

(Argument of counsel.)

(Testimony of George J. Ryan.)

The COURT.—I would like to ask the Captain one more question, if there is no objection.

Mr. BOGLE.—None at all.

Mr. SHORTS.—No objection, of course.

TESTIMONY OF GEORGE J. RYAN, FOR PLAINTIFF (RECALLED).

GEORGE J. RYAN, recalled as a witness on behalf of plaintiff, testified as follows:

"Q. (By the COURT.) What was the condition of the water just before the vessel listed?

A. It was perfectly calm.

Q. It was perfectly calm? A. Yes, sir.

Q. No current or waves of any sort?

A. There is always that current there.

Q. What current?

A. The cross-current from the river coming in at that point.

Q. What was the condition of that cross-current there?

A. Well, it is really hard to see the condition of the current.

Q. How is that?

A. It is really hard to see just how the tide comes, from up in a pilot-house on a boat. Sometimes you can see it boiling.

Q. Did you run into that before it listed?

A. Yes, sir.

Q. Just how did you operate then?

A. Well, you always turn your boat to meet the

(Testimony of George J. Ryan.)

current, to head into it, just like you would head into a violent storm.

Q. When you ran into that current you listed?

A. Yes, sir. [50]

Q. Listed one way, and then the other way?

A. Yes.

Q. And then sunk?

A. And then went over on her second list.

Q. How big was this current, how did it operate upon the surface of the water?

A. On the surface of the water it looks like a small whirlpool.

The COURT.—All right.

Mr. BOGLE.—May I ask the Captain a question?

The COURT.—Yes.

Q. (By Mr. BOGLE.) Do these currents always operate on the surface or are any of them down below the surface?

A. Well, they operate down below also, but we do not know how deep.

Q. You were drawing how much water?

A. About eight feet; about eight feet, six inches.

Mr. BOGLE.—That is all.

(Witness excused.)

The COURT.—As I view it, that is the determining matter in this case, this cross-current, so far as my mind is concerned.

(Argument of counsel.)

The COURT.—I will frankly say to you gentlemen now, that I believe the cross-currents had

something to do with this boat sinking. I will take the matter under advisement."

The testimony taken before the United States Local Inspectors of Hulls and Boilers at Seattle and offered on behalf of both parties as evidence in this case follows:

TESTIMONY OF RICHARD L. SUMNER.

RICHARD L. SUMNER, being first duly sworn, testified before the United States Local Inspectors of Hulls and Boilers:

That he was in charge of the navigation of the steamer "Fulton" bound from Seattle to Tacoma; that he had just come up from dinner and the second mate was in charged and that he walked into the pilot-house to steady the "Fulton" on her course, at six P. M. It was quite dark, the weather clear. He saw a dim green light on the starboard bow; he gave two short blasts which were answered; that he was standing looking over the quartermaster's shoulder at the compass in the pilot-house; that the second mate entered the pilot-house and started to enter the course in the log [51] book. He looked through the pilot-house starboard door, the "Rubiayat" being just abeam, and sang out, "Look at her 'turn turtle.'" Immediately the "Fulton" was stopped, backed, and all hands called on the boat deck for the purpose of manning the life-boats which were dropped in the water and proceeded to the wreckage of the "Rubiayat," rescuing nine members of her crew. That at the time the second

(Testimony of Richard L. Sumner.)

mate called his attention to the "Rubiayat," she was about one-eighth of a mile off, in the vicinity of the Baker dock. That he saw the "Rubiayat" listing and "turning turtle." That she was listing to starboard; that from the course the "Rubiayat" was making, he judged she was going to Olympia. That the hull of the "Rubiayat" disappeared completely within five minutes from the time she foundered. That at the time of the foundering of the "Rubiayat," there was a very light westerly wind and clear weather. That he had never seen the "Rubiayat" before and had no explanation to offer as to the cause of her foundering.

TESTIMONY OF HENRY J. KOLSTER.

HENRY J. KOLSTER, being first duly sworn, testified before the United States Local Inspectors of Hulls and Boilers:

That he was second mate of the "Fulton." That the "Fulton's" life boats were lowered speedily at the time of this accident and reached the wreckage about ten minutes after the "Rubiayat" had foundered; the night was dark and the tide, ebb. That the wreckage was about half a mile off the docks. He further testified that he was watching the "Rubiayat" and when she was about four points off the "Fulton's" starboard bow, she listed to port, came back to starboard, and foundered. That at the time she foundered, she was right abeam the "Fulton." That when he saw the vessel [52] foundering, he sang out to the chief mate that she

(Testimony of Henry J. Kolster.)

was "turning turtle." That the "Rubiayat" did not blow any distress signals; that the listing and foundering happened so quickly that they did not have time to do anything. That at the time he first noticed she was in distress until she had turned over was about thirty seconds. That as soon as the "Rubiayat" had foundered, the "Fulton" reversed and got her life-boats out.

TESTIMONY OF HENRY MEHNS.

HENRY MEHNS, being first duly sworn, testified before the United States Local Inspectors of Hulls and Boilers:

That he was chief engineer of the "Rubiayat"; that her engines were in good condition at the time of the accident; that he was in the galley at the time the vessel foundered; that the "Rubiayat" had five hundred gallons of fuel oil in the tank below the main deck; that the engines were located about amidships; that she had a water-tank aft which had a capacity of 280 gallons but which at the time of the accident were only half full; that there was quite a bit of rock and gravel as ballast in her bottom; that her water-tank is 29 inches by 7 feet, set on blocks against the stern end of the boat athwart ships; that the vessel was loaded with freight in the lower hold composed of canned fruit; that he did not know the number of cases. That she also had freight on the main deck, consisting of canned fruit and gypsum in hundred pound sacks; this was stowed forward of the elevator and also aft of the

(Testimony of Henry Mehns.)

elevator; that the "Rubiayat" has a small house coming from the main deck to the upper deck; that the freight on the main deck was pretty well distributed around but he did not know the quantity of same; that there was also a little freight on the upper deck near the bow, but the quantity of same he did not know; that the [53] freight elevator was up, level with the upper deck; that he did not know of anything wrong with the "Rubiayat" until she tipped over; that there was no warning or rolling of the vessel; that she took a small port list and then came back to starboard and never came up; that it all happened in about half a minute; that there was no water in the vessel's bilges at the time she foundered. That as she was loaded upon leaving Tacoma, she had about one and one-half feet free board. He did not think there was anything unusual in the amount of freight she had on board that trip and that she had had as much on previous trips; that he did not notice anything unusual in the way the freight was stowed; before the vessel started to list, he was not alarmed in any way and cannot account for her foundering. That when loaded, the "Rubiayat" has a speed of eight miles per hour and had been making that speed for about fifteen minutes from the time she left the gypsum dock until she foundered, and that she kept perfectly upright until just before she foundered. That George Ryan, master of the vessel was in charge of the navigation and was at the wheel at the time she foundered.

(Testimony of Henry Mehns.)

He further testified that the freight on the upper deck was composed of sacks, canned fruit and furniture; that there was no freight aft on this deck nor was there any freight on the hurricane deck. When the vessel is under way, the elevator is always up and forms a part of the upper deck.

Q. Do you think it was strange that she should list to port before she listed to starboard?

A. No.

Q. What do you suppose made her list both ways in such a short time

A. The only think I can see is the tide rip.

That in addition to the oil tanks and water-tank, the vessel had one tank of cylinder oil and one tank of kerosene, on the starboard [54] side, containing five gallons and forty gallons respectively.

TESTIMONY OF CHARLES SCHROEDER.

CHARLES SCHROEDER, being first duly sworn, testified before the United States Inspectors of Hulls and Boilers:

That he held the position on the "Rubiayat" of dock stevedore, it being his duty to load the trucks as they went aboard the vessel; that upon leaving Olympia, they had on board cases of canned goods, cases of eggs, and household furniture. That after leaving Olympia, their next stop was at Tacoma where they took on board gypsum in hundred pound sacks. That this was loaded on the main deck, about half forward and half aft; that in addition to the gypsum, they took on board about two hun-

(Testimony of Charles Schroeder.)

dred sacks of plaster weighing approximately one hundred pounds to the sack; this was also loaded on the main deck, after half forward and half aft.

That he had been on the "Rubiayat" about three and one-half months and considered her a vessel of good stability and that they had had just about as much cargo on her on previous trips.

"Q. Do you consider that she was overloaded?

A. I could not tell you that. I guess she was all right on that top deck there.

Q. Do you think there was more on the top deck than usual?

A. No, she had just as much there before.

Q. Did she ever at any time while you were on her show any tenderness? A. She rolled quite a bit.

Q. But she always came back? A. Yes."

The accident happened about 6:30. Previous thereto, he had not felt any alarm as to the condition of the "Rubiayat." That he had previously noticed the "Rubiayat" make a list on entering a tide rip and when passing other boats but not as bad as she took this time. That he had no idea what caused her to list. "Can't figure it out?" That the water was level. "There were no passing boats or nothing else" to cause her to list. "Think something must have happened below"; that the boat was loaded down by the head when she left the dock. The weather was clear, and they did not pass any other vessel.

That he had no knowledge as to the manner in which the freight was [55] stowed as that would

(Testimony of Charles Schroeder.)

be done by the stevedore on board the "Rubiayat." He was an experienced stevedore and had always been careful in stowing cargo. That at the time of the accident, there was no shock or jar of any kind. That upon leaving the dock, the vessel was on an even keel and her ports were all closed; that with the vessel going at her regular speed, putting her wheel hard over might affect her stability. The witness was not sure on this point.

TESTIMONY OF THOMAS NELSON.

THOMAS NELSON, being first duly sworn, testified before the United States Inspectors of Hulls and Boilers:

That he was a stevedore and assisted in loading the "Rubiayat" at Tacoma. That he had been on the boat about six months and when the boat left Tacoma he had no fear that she was overloaded; that he had seen her loaded just as heavy on previous occasions; that he had seen just as much freight on her upper decks; that in loading this vessel, the freight was trucked from the dock to the elevator and then the elevator lowered to the deck where the freight was to be discharged. That she was stowed from wing to wing, with no chance of her cargo shifting and that the cargo could not have been better stowed. That the stevedore in charge of the loading was an experienced and capable man and that the stowing was done under his and the captain's direction. That the vessel was loaded down pretty heavy but he had seen her loaded just as

(Testimony of Thomas Nelson.)

heavy before and had no opinion as to why she turned over. The only reason he could assign for the accident was that she might have sprung a leak. He had had about twenty-five years' experience on small vessels; that upon leaving Tacoma the vessel had between seven and eight inches of free-board and was down by the head. That he had [56] seen her loaded as deep before. The first indication he had of any danger was when she started to list to starboard; everybody ran to the port side; then she came back and straightened up a little and all of a sudden went back to starboard and kept on going.

TESTIMONY OF ALBERT CONKLIN.

ALBERT CONKLIN, being first duly sworn, testified before the Local United States Inspectors of Hulls and Boilers:

That he had been steamboating on Puget Sound for about twenty years and was familiar with the manner in which freight was handled on vessels of the type of the "Rubiayat." That on such vessels, they always load freight on the upper deck. That he was a stevedore on the "Rubiayat" and assisted in loading her. That the freight on the upper or toothpick deck, forward of the elevator consisted of canned goods loaded at Olympia, the amount of which he was unable to state. That when the vessel left Tacoma, her guards which are six inches wide, were quite a ways above the water; that it was dark at the time of leaving Tacoma and he could not say

(Testimony of Albert Conklin.)

exactly how much free-board she had. That after leaving, the witness was eating his supper when the vessel took a slight list to port, he was not alarmed but he became alarmed when she took a list to starboard and did not come back. That from his experience in loading these small boats, he had no opinion as to the cause of the accident; the vessel was not filled up and there was plenty of room for additional freight. The vessel had recently been in drydock and was not leaking; they had freight down in the hold and on the upper deck which ought to have kept her from being top heavy. That at the time she foundered, there was no shock of any kind. [57]

TESTIMONY OF HERMAN POLZIN.

HERMAN POLZIN, being first duly sworn, testified before the Local United States Inspectors of Hulls and Boilers:

That he had been boat stevedore on the "Rubiayat" since April 20th previous to the accident and has previously been stevedore on other boats of the same company and had been working as stevedore on small boats on Puget Sound for several years. That there was tonnage space below the upper deck for three or four hundred more sacks of cargo. The lower hold was filled. There was room to have put all cargo on the upper deck below the upper deck if they had wanted to; that the cargo was stowed both at Olympia and Tacoma under the directions of the master. I think we have often had more cargo in

(Testimony of Herman Polzin.)

weight on this vessel on previous trips but had never had as much gypsum. On this trip, she seemed to be a little bit heavier forward than aft. On previous trips she seemed to be a little more down aft. The cargo was well stowed and would not shift with ordinary rolling of the vessel, although if might have shifted when the vessel foundered. When the vessel left the dock at Tacoma, the witness did not feel alarmed as to the condition nor did he feel any alarm until after the first roll when she went over and foundered. It all happened very quick. It seemed right funny; she didn't act right. She first took a little list to starboard, came back to port and the next time she took a very severe list and tipped over, the water coming into the galley. The witness had no idea as to what caused her to founder. Can think of no other reason why she turned over other than being top-heavy. The vessel had about one foot free-board when she left Tacoma. The doors were all closed and while she had a heavy load, she had previously carried just as much heavy freight. From his previous experience with said vessel, he thought it was all right for her to carry freight on her upper deck. Above the upper [58] deck is the pilot-house, the captain's quarters, and the life-boats. It is a commom practice to have the elevator platform even with the upper deck. The superstructure on this boat was pretty heavy but not any heavier than any of the other Sound boats. The lower hold was pretty well filled up with canned goods but a few truck-loads more might have been

(Testimony of George Joseph Ryan.)

loaded in the hold. The elevator was about fifteen feet wide and the space below the elevator, under the elevator shaft, there was no freight loaded in the hold.

TESTIMONY OF GEORGE JOSEPH RYAN.

GEORGE JOSEPH RYAN, being first duly sworn, testified before the United States Local Inspectors of Hulls and Boilers:

That he had been master of the "Rubiayat" for five and one-half months and had been master and deck-hand of the "Chaco" owned by the same people previous to that time. That on previous trips, it was a common thing to carry gypsum, but not as much as was aboard the "Rubiayat." Approximately 62 tons dead weight of gypsum was loaded on the "Rubiayat," the dead weight capacity of said vessel being about 130 tons. That upon leaving Olympia, the vessel had probably 58 tons dead weight of cargo, composed mostly of canned goods and about two tons of household goods, so that on leaving Tacoma, they had on board approximately 122 tons of cargo, consisting of canned goods, gypsum, and plaster. That on previous trips, the witness believed they had had just as much dead weight of cargo as on this trip. That upon leaving Tacoma, the draft of the vessel was about seven and one-half feet forward and eight and one-half feet aft. That would give her about six inches freeboard from the main deck, which is about the maximum the vessel could be loaded with safety. He did

(Testimony of George Joseph Ryan.)

not believe she had ever been loaded so that [59] she had any less free-board. That she was deeper by the ports on this trip than on previous voyages; that about ten tons of cargo was left at Tacoma; the witness thought it perfectly safe to put these ten tons aboard but the men were tired and the rest was left until the next trip. That upon leaving the gypsum dock at Tacoma, there was probably space for thirty tons dead weight more cargo, figuring forty feet to the ton. That if this additional ten tons had been put aboard, the vessel would probably have been below her guards. The six inches free-board was below the guard. The guard itself being six inches would give her twelve inches free-board from the main-deck. The ports were all closed upon leaving Tacoma. The vessel had never previously had any freight damaged by salt water. Even though the vessel rolled, very little water would come through the ports and not enough to damage the cargo.

The witness further stated that he was at the wheel when the vessel left the dock at Tacoma; that she backed out from the dock, turned around, and headed up stream or up the waterway. That in making this maneuver, she showed no signs of tenderness or crankiness. The "Indianapolis" was coming right back of the "Rubiayat" and she showed no signs of crankiness in passing the "Indianapolis." The vessel steered all right upon leaving her dock and after turning around, she was hooked on.

(Testimony of George Joseph Ryan.)

He further testified that upon leaving Olympia, there were about twenty-one tons of canned goods in the lower hold; that the lower hold was about ninety per cent filled at said time; they probably could have put sixty or seventy-five more cases in the lower hold. In loading at Olympia and Tacoma, the vessel's freight elevator was used in handling the cargo. Upon leaving Tacoma, there was twenty-one tons of cargo in the hold and about 90½ tons on the main-deck and that on the upper [60] deck was ten and one-half tons of cargo forward of the elevator. That the elevator when not used in loading is kept up on the upper deck and furnishes a portion of said deck to walk on.

The witness further stated that he could not account for the capsizing. That in his opinion, it could not be ascribed to top-heaviness, as he had previously put fifteen tons of rock ballast alongside her keel and taken the water-tank down from the hurricane deck into the hold. That on leaving Tacoma, she had thirty-six tons dead weight in the lower hold; that is, twenty-one tons of cargo and fifteen tons of rock ballast. In addition she had her oil tanks containing probably forty tons of oil below the main-deck, and for this reason he thought she was stiff enough. That at the time of the accident, there was no sea and just a little northerly wind; they did not meet any vessel excepting the "Fulton" and the "Indianapolis" and that in taking the swell from the "Indianapolis," the "Rubiayat" stood up well.

(Testimony of Captain Ryan.)

The witness further stated that he had charge of stowing the cargo. That it was snugly stowed from wing to wing, with no possible chance of shifting.

Captain RYAN, recalled:

Upon being recalled, CAPTAIN RYAN testified before the United States Local Inspectors of Hulls and Boilers:

That after leaving the dock at Tacoma, he headed the vessel down the waterway: That before the accident he had cleared the waterway and shaped his course to Brown's point, the course being NW. b N. ½ N; that he first saw the steamer "Fulton" three to four hundred yards off the starboard bow; and the "Rubiayat" in passing out of the waterway seemed to make her course all right [61] and after passing out of the waterway and changing the course for Brown's Point, she steered all right up to the time he turned her wheel to change her course when she took a list to port and then listed over to starboard and went down by the head and over on her side. The bow seemed to go down first. He further testified that the vessel was in drydock in July previous to the accident; that she was scrapped and painted and some caulking done and he considered that her hull was in perfect condition when she left the drydock. The vessel did not leak any and the first indication of any accident was when she listed over on her side and took a small list to port and then gradually went over to starboard.

(Testimony of Captain Ryan.)

"Q. How do you account for the list, first to port and then to starboard?

A. Really it is hard to account for it. I had blown a starboard whistle by the 'Fulton' and brought the wheel over ½ a point. Was steering NW. by N. and brought her over to NW.¼ N. She then took a list to port.

Q. After you moved the wheel? A. Yes, sir."

On many previous occasions he had made the same movement of the helm and she had taken a slight list and a large list and there had been crankiness more or less after putting the rocks in her. The rock ballast was put in on three different occasions and after this ballast was all in, she behaved better. This rock ballast was all forward beneath the elevator and forward underneath the floor along the keelson.

The witness further stated that he was unable to determine the cause of the vessel foundering, but that if he was loading her again with the same cargo, he does not believe he would put any on the upper deck. That above the upper deck are located the pilot-house, the captain's room and the lifeboats and the top of the derrick also extends up quite a ways from the platform and the derrick platform is always carried on the upper deck and was up at the time of the accident. The only testimony by this witness before [62] United States Inspectors of Hulls and Boilers in regard to the passing of the "Indianapolis" was as follows:

(Testimony of Captain Ryan.)

"Q. Did you meet any vessel after you left the dock? A. Met the 'Fulton.'

Q. Aside from the 'Fulton'? A. No, sir.

Q. Any vessel make a swell?

A. The 'Indian' at that time.

Q. Stood up well? A. Yes, sir.

Q. Were you at the wheel when you left the dock? A. Yes, sir.

Q. Were you headed out when you left the dock?

A. Backed out from the dock.

Q. Then headed up stream? A. Yes, sir.

Q. In maneuvering—turning around—would you say that she was tender or cranky?

A. No signs of crankiness. The 'Indian' was coming right back to me and didn't show signs of crankiness."

That by the word "Indian," he meant the S.S. "Indianapolis"; that in his testimony before the Inspectors he made no mention of tides or currents in the Tacoma Harbor. [63]

TESTIMONY OF FRANK E. LOVEJOY.

FRANK E. LOVEJOY, being first duly sworn, testified before the United States Local Inspectors of Hulls and Boilers:

That the "Rubiayat" had fifteen tons of rock ballast; that she was particularly built for this run; that he had had experience in designing and building boats of this type and practically designed this particular vessel. That he had worked with his father on five or six boats previous

(Testimony of Frank E. Lovejoy.)

to this as a draftsman and had had charge of finishing up and putting in the equipment of several steamers; that after this ballast was put in the "Rubiayat," he considered that she was safe to carry any reasonable load that might be placed on her.

"Q. After the ballast was put on was she sufficiently stiffened to carry the loads that she would be expected to carry?

A. I figured that she was with a large margin of safety. She had run for at least two weeks without any ballast. The ballast was put in as a factor of safety. There were so many landings to be made where freight would be discharged that her stability would be retained even with no freight in the lower hold.

Q. Now, Captain, according to the testimony, we infer that if the cargo were properly distributed the vessel would still maintain at all times her proper stability. A. Yes, sir.

Q. That is fair? A. Yes, sir.

Q. So that apparently improper distribution of the cargo on this particular occasion was the cause of this accident? A. Probably a big factor.

Q. Have you any other reasons? In your opinion was there any other contributing factor, other than improper distribution of freight?

A. There was a meeting of strong cross-currents. Without having a sufficient margin of safety, such as the way the vessel was loaded, would be possibly another cause."

(Testimony of Frank E. Lovejoy.)

The witness further stated that he had been steamboating on Puget Sound for seventeen or eighteen years and had had a license either as master, pilot, or mate for fourteen years and was fairly familiar with the tidal and current conditions on the Sound, and that a boat has to be designed to meet these conditions [64] and that in this case, in designing the "Rubiayat" he had figured on cross-currents and adverse tidal conditions and if the boat was loaded with safety, she should meet these conditions. That up to the time of this accident, he had left the responsibility of proper loading with the master of the vessel and that his judgment appeared to be very good. That he had discussed with the master the stability of the vessel and the stowing of freight and that there was no definite limit ever spoken of and no definite instructions about the stowing of cargo given; that he had perfect confidence in the master, had previously sent for him to different ports on Puget Sound for loading and depended on his good judgment.

That by agreement of parties, Plaintiff's Exhibit 3 (same being a picture of the vessel) was admitted in evidence.

Defendant offered no further evidence and the case was thereupon argued by the attorneys for the respective parties and submitted to the court.

The Court took the case under advisement, and on July 16th, 1925, rendered an opinion.

Thereafter, and on July 24, 1925, findings of fact and conclusions of law were duly entered, with plaintiff's exceptions thereto made a part thereof. A judgment has been entered based on said findings of fact and conclusions of law.

CERTIFICATE OF JUDGE TO BILL OF EXCEPTIONS.

And now, because the foregoing matters and things are not of record in this case, I, Jeremiah Neterer, District Judge and the Judge trying the above-entitled action in the District Court of the United States for the Northern Division of the Western District of Washington, do hereby certify that the foregoing bill of exceptions truly sets forth the proceedings had before me in the trial of the above-entitled action and contains a concise statement of [65] so much of the evidence and other matter as is necessary to explain the exceptions therein reserved and their relation to the case. The foregoing bill of exceptions shows the rulings of the Court on the questions of law arising at the trial and the exceptions taken and allowed thereto by the plaintiff. Said bill of exceptions was duly prepared and submitted within the time allowed by the rules of this court and is now signed and settled as and for the bill of exceptions in the above-entitled action and the same is ordered to be made a part of the record in said action.

Done in open court this 30th day of July, 1925.

JEREMIAH NETERER,
Judge.

Copy of attached plaintiff's proposed bill of exceptions received and due service thereof admitted upon July 25th, 1925.

SHORTS and DENNEY,
Attorneys for Defendant.

[Endorsed]: Filed Jul. 30, 1925. [66]

[Title of Court and Cause.]

STIPULATION RE FORWARDING ORIGINAL EXHIBITS TO CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

IT IS HEREBY STIPULATED by and between the parties hereto by their respective attorneys that the original exhibits introduced by the parties to this action upon the trial of said cause be transmitted to the Circuit Court of Appeals for the Ninth Circuit.

BOGLE, BOGLE & HOLMAN,
Attorneys for Plaintiff.
SHORTS & DENNY,
Attorneys for Defendant.

[Endorsed]: Filed Jul. 30. 1925. [67]

[Title of Court and Cause.]

ORDER RE FORWARDING ORIGINAL EXHIBITS TO CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

On the stipulation of the parties, it is hereby

ORDERED, that the original exhibits introduced by parties to this action upon the trial thereof be transmitted to the Circuit Court of Appeals for the Ninth Circuit.

Dated July 30, 1925.

JEREMIAH NETERER,
Judge.

[Endorsed]: Filed Jul. 30, 1925. [68]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please prepare a transcript of the complete record in the above-entitled cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, under the writ of error to be perfected herein, and include in said transcript the following proceedings, papers, records and files, to wit:

1. Complaint.
2. Order of removal from Superior Court of Washington.
3. Answer.

4. Demurrer to answer.
5. Decision on demurrer.
6. Order overruling demurrer. Reply.
7. Stipulation waiving jury trial.
8. Findings of fact and conclusions of law, with exceptions thereto.
9. Judgment.
10. Bill of exceptions.
11. Petition for writ of error.
12. Assignments of error.
13. Order allowing writ of error and fixing bond.
14. Supersedeas bond and cost bond.
15. Writ of error.
16. Citation on writ of error.
17. Stipulation and order as to original exhibits.
18. This praecipe, and any and all records, entries, minutes, orders, papers, proceedings, and files necessary or proper to make a complete transcript of the record of said cause in said District Court, as required by law and the rules of this court and those of the United States Circuit Court of Appeals for the Ninth Circuit.

BOGLE, BOGLE & HOLMAN,
Attorneys for Plaintiff.

Due and sufficient service by copy of the foregoing praecipe is acknowledged this 30 day of July, 1925.

SHORTS and DENNEY,
Attorneys for Defendant.

[Endorsed]: Filed Jul. 30, 1925. [69]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 69, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing-entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on return to writ of error herein, from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the plaintiff in error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [70]

Clerk's fees (Act February 11, 1925) for making record, certificate or return, 170 folios at 15¢.....$25.50

Certificate of Clerk to transcript of record with seal..... .50
Certificate of Clerk to original exhibits, with seal..... .50
Total.....$26.50

I hereby certify that the above cost for preparing and certifying record, amounting to $26.50, has been paid to me by attorney for plaintiff in error.

I further certify that I hereto attach and herewith transmit the original writ of error and citation on writ of error issued in this cause.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 26th day of August, 1925.

[Seal] ED. M. LAKIN,
Clerk United States District Court, Western District of Washington.

By S. M. H. Cook,
Deputy. [71]

[Title of Court and Cause.]

WRIT OF ERROR.

United States of America,—ss.

The President of the United States of America, to the Judges of the District Court of the United States for the Northern Division of the Western District of Washington, GREETING:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is

in the said District Court before the Honorable Jeremiah Neterer, one of you, between Olympia Canning Company, a corporation, plaintiff, and plaintiff in error, and The Union Marine Insurance Company, Ltd., a corporation, defendant, and defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error as by petition doth appear, and we, being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid, in this behalf do hereby command you, if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same in San Francisco, California, within thirty days from the date hereof, to be then and there held; that the records and proceedings aforesaid being then and there exhibited, the [72] said Circuit Court of Appeals may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States of America should be done.

WITNESS, the Honorable WILLIAM H. TAFT, Chief Justice of the Supreme Court of the United States, this 30th day of July, 1925.

[Seal] ED. M. LAKIN,
Clerk of the District Court of the United States for the Northern Division of the Western District of Washington.

By S. E. Leitch,
Deputy.

The foregoing writ of error was duly served upon the District Court of the United States for the Northern Division of the Western District of Washington, by filing a copy thereof with me, as the Clerk of said court, on this 30th day of July, 1925.

ED. M. LAKIN,
Clerk of the United States District Court for the Northern Division of the Western District of Washington.

By S. E. Leitch,
Deputy.

Due and sufficient service by copy of the foregoing writ of error is acknowledged this 30th day of July, 1925.

SHORTS and DENNY,
Attorneys for Defendant. [73]

[Endorsed]: Filed Jul. 30, 1925. [74]

[Title of Court and Cause.]

CITATION ON WRIT OF ERROR.

United States of America,

Western District of Washington,—ss.

To the Union Marine Insurance Company, Ltd., a Corporation, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the Northern Division of the Western District of Washington, in a cause wherein Olympia Canning Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand at Seattle, Washington, in said District, this 30 day of July, 1925.

[Seal] JEREMIAH NETERER,
Judge.

Due and legal service of the within citation is hereby accepted, this 30th day of July, 1925.

SHORTS and DENNEY,
Attorneys for Defendant in Error. [75]

[Endorsed]: Filed Jul. 30, 1925. [76]

[Endorsed]: No. 4679. United States Circuit Court of Appeals for the Ninth Circuit. Olympia Canning Company, a Corporation, Plaintiff in Error, vs. The Union Marine Insurance, Ltd., a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filed August 28, 1925.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 4679

OLYMPIA CANNING COMPANY, a corporation,
Plaintiff in Error

vs.

THE UNION MARINE INSURANCE COMPANY, LTD., a corporation,
Defendant in Error

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Brief for Plaintiff in Error

W. H. BOGLE
LAWRENCE BOGLE
FRANK E. HOLMAN
Attorneys for Plaintiff in Error
Central Building, Seattle, Washington

In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 4679

OLYMPIA CANNING COMPANY, a corporation,
Plaintiff in Error

vs.

THE UNION MARINE INSURANCE COMPANY, LTD., a corporation,
Defendant in Error

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Brief for Plaintiff in Error

STATEMENT OF FACTS

Plaintiff brought this action to recover for the loss of goods under a contract of marine insurance aboard the S. S. "Rubiayat" on a voyage from Olympia via Tacoma to Seattle. The policy was

the standard form of voyage policy with operative words covering the risk of insurance, as follows:

"And touching the adventures and perils which the said company is contented to bear and does take upon itself in the voyage so insured as aforesaid, they are of the seas, men of war, fire, enemies, * * * jettisons, * * * barratry of the master and mariners and all other perils, losses and misfortunes that have or shall come to the hurt, detriment, or damage of the aforesaid subject matter of this insurance or any part thereof."

The complaint alleges that goods of the value of $8,442 were shipped by plaintiff at Olympia, for transportation and delivery at Seattle, and that the insurance covered one-half the value of said shipment. The complaint contains the usual allegations to the effect that the goods were shipped on the vessel aforesaid and at the time said steamer departed from the port of Olympia on said voyage, she was in every respect seaworthy for her contemplated voyage, properly manned and equipped, and that during the course of said voyage, without any fault or negligence on the part of the plaintiff, said vessel foundered and together with said goods became a total loss. It is alleged that said loss was by reason of the perils specified in said policy of insurance; that due demand had been made from defendant and payment refused.

Defendant, answering the complaint, admitted the contract of insurance, the shipment of the goods for carriage from Olympia by way ports to Seattle, the seaworthiness of the vessel at the time of the commencement of the voyage when sailing from Olympia, the foundering of the vessel, and the total loss of the goods without fault or negligence on the part of the plaintiff; and, as an affirmative defense, the answer alleged that said steamer, after sailing from Olympia with plaintiff's goods on board bound for Seattle via Tacoma, called at the port of Tacoma and there took on additional cargo. That said additional cargo "was so improperly stowed on the vessel as to make her top-heavy, unstable, tender, and unfitted to continue the voyage." That shortly after leaving Tacoma, she capsized and sank. That the weather was fair and the sea calm and "that the capsizing and sinking of said vessel and the loss of said cargo was caused solely by her said top-heavy, unstable, tender and unfit condition and was not caused by perils of the sea or any other perils or risks covered by the contract of insurance mentioned in plaintiff's complaint."

Plaintiff demurred to this affirmative defense and its demurrer was overruled. (R. p. 21, 27.)

By stipulation, the case was tried to the judge without a jury.

The steamship "Rubiayat" was a small Sound steamer, 65 feet in length over all, 59 feet 5 inches between perpendiculars; 22 feet four inches in width, and 8 feet 4 inches in depth, with a net tonnage of 74 tons. The testimony shows that the vessel left Olympia with approximately sixty tons of cargo aboard and made her usual stop at Tacoma, where she took on approximately sixty additional tons of cargo, consisting of gypsum in sacks. She left the dock at Tacoma at about 6:30 p. m. In backing out of the waterway from her dock, she was passed by the steamer "Indianapolis" coming in. This latter steamer threw up a displacement wave of some six feet swell which struck the "Rubiayat" broadside, but without in any wise affecting the steadiness of the latter steamer. After backing out of the waterway and turning on her course to Seattle and proceeding at full speed for a distance of approximately two and one-half miles, the "Rubiayat," being then opposite the Terminal Dock in Tacoma, and having just passed the incoming steamer "Fulton," struck the tide-rips or cross-currents that frequently prevail at that point and

making a turn in her course for the purpose of meeting these cross-currents head on, the vessel first took a list to port and upon the helm being put hard over, recovered and immediately took a list to starboard and capsized. Neither the master nor any of the seamen on board the "Rubiayat" had noticed any tenderness or crankiness in the movements of the steamer prior to the time she struck these cross-currents and capsized. She had frequently carried as much or more cargo on previous trips although the stowage may have been somewhat different. (R. p. 61, 63, 64, 66, 68.) If there was any improper trim in the stowage on this trip, it was the result of bad judgment of the master who was admittedly experienced and capable. (R. 75.) These cross-currents or tide-rips are described by Captain Lovejoy, as follows:

"Q. Captain, are you familiar with the tides and currents in Commencement Bay?

"A. Yes, sir.

"Q. Just state to the Court what the currents there are, the action of the tide in Commencement Bay, referring to this Plaintiff's Exhibit 2.

"A. The currents as a whole are circular in motion in Commencement Bay, due to the tide ebbing down through by Point Defiance, and down through the West Pass, and the flood coming through the East Pass, or Vashon Island, so that at every flood there is a clockwise motion of the tides in the bay there at Tacoma, probably eighty per cent of the

time, except near slack water, that is, both slack high and low, the tides are flowing in one direction from about Sperry's Mill or the Terminal Docks, out towards Point Defiance, Old Town, out that way. The tide is a good eighty per cent of the time in the one direction, north. There is a break at the edge of this circle, which is about off the Terminal Docks, or near where the 'Rubiayat' was sunk, where there is three separate currents entering into it. One is this circular current, the other is the water from the water at Tacoma, where the regular boats land, and the other is a current from the river. It is uncertain as to just where that is. It will vary back and forth over an area of a mile or so, but those familiar with towing logs in there watch the boats come in. It is very conspicuous. This large circle in the bay, and a boat will go at least three or four miles out of the shortest route between Point Defiance and the mills in making the mills, due to this tide, and will do it even though to all appearances there should be a fair tide.

"Q. What effect does the current coming out of the waterway, and this river—is that what you have just described?

"A. Yes, sir. It would be uncertain as to just what it would be. There would be cross-currents, and a tendency to whirlpools. While they are not very strong they are noticeable to anyone steering a boat through them?

"THE COURT: What effect does it have on the boat?

"A. To make her either loose or steer crooked; that is, she would tend to deviate from her course when meeting this, or else list over a little.

"Q. Of course you are familiar with the construction of the 'Rubiayat', her design, etc?

"A. Yes, sir.

"Q. And you are familiar with the manner in which she was loaded on the day she foundered?

"A. Yes, sir, I think I am.

"Q. Considering the fact that she made her turn in the waterway and encountered the displacement waves from the 'Indianapolis' without any serious effect on her, and that she proceeded approximately two miles thereafter under full speed without indicating any crankiness, what would you say would be at least one of the contributing factors to the sudden list and foundering of this vessel?

"MR. SHORT: I object to that upon the ground that it calls for the conclusion of the witness. The witness was not present aboard the vessel at the time, and any information he can have is purely hearsay.

"MR. BOGLE: I am not asking him for the fact; I am asking him as an expert, from his knowledge of the tidal conditions in that harbor, and the admitted facts with reference to this vessel.

"THE COURT: Let it go in the record. You may answer.

"A. She undoubtedly, or in my mind met with factors other than wholly the loading of the vessel. That is, she met currents which caused her to take a list there, which was the real start of her capsizing." (R. p. 50, 51.)

The incidents immediately connected with the capsizing are described by Capt. George J. Ryan, master of the "Rubiayat" at the time of the accident, as follows:

"Q. (By the Court): What was the condition of the water just before the vessel listed?

"A. It was perfectly calm.

"Q. It was perfectly calm?

"A. Yes, sir.

"Q. No current or waves of any sort?

"A. There is always that current there.

"Q. What current?

"A. The cross-current from the river coming in at that point.

"Q. What was the condition of that cross-current there?

"A. Well, it is really hard to see the condition of the current.

"Q. How is that?

"A. It is really hard to see just how the tide comes, from up in a pilot house on a boat. Sometimes you can see it boiling.

"Q. Did you run into that before it listed?

"A. Yes, sir.

"Q. Just how did you operate then.

"A. Well, you always turn your boat to meet the current, to head into it, just like you would head into a violent storm.

"Q. When you ran into that current you listed?

"A. Yes, sir.

"Q. Listed one way, and then the other way?

"A. Yes.

"Q. And then sunk?

"A. And then went over on her second list.

"Q. How big was this current, how did it operate upon the surface of the water?

"A. On the surface of the water it looks like a small whirlpool.

"THE COURT: All right.

"MR. BOGLE: May I ask the Captain a question.

"THE COURT: Yes.

"Q. (By Mr. Bogle): Do these currents always operate on the surface or are any of them down below the surface?

"A. Well, they operate down below also, but we do not know how deep.

"Q. You were drawing how much water?
"A. About eight feet; about eight feet, six inches.
"MR. BOGLE: That is all.
"THE COURT: As I view it, that is the determining matter in this case, this cross-current, so far as my mind is concerned."

(Argument of counsel.)

"THE COURT: I will frankly say to you gentlemen now, that I believe the cross-currents had something to do with this boat sinking. I will take the matter under advisement." (R. p. 56, 57.)

The trial judge, after the testimony was completed, made the following statement on the material question in the case as viewed by him at the time:

"THE COURT: I think the thing that will determine the case will be this: In my judgment, in my recollection of the case as heretofore submitted; did the currents that were created, as testified to by the last witness on the stand, did they create such a condition as to be a peril within the provisions of the policy. This boat having left the wharf and ran about two miles and a half into the place where this witness says these currents were, did the condition of those currents, the operation of them upon the vessel, create a peril within the policy. That is about the only thing in this case in my judgment." (R. p. 55.)

And after Captain Ryan was recalled at the request of the court and had made the statement above quoted with respect to the effect of the current at the time of the accident, the court said:

"As I view it, that is the determining matter in this case, this cross-current, so far as my mind is concerned. I will frankly say to you gentlemen now that I believe the cross-currents had something to do with this boat sinking. I will take the matter under advisement." (R. p. 57.)

It is agreed that the value of the goods lost was $8,442, and the amount recoverable by the plaintiff, if it is found entitled to recover, is $4,221, with interest from September 29, 1923.

ARGUMENT

The policy provides that the adjustment and settlement of losses thereunder shall be made in conformity with the laws and customs of England.

I

The Implied Warranty of Seaworthiness Was Fully Complied With

It is specifically admitted in the answer that the vessel was entirely seaworthy at the time the insured goods were loaded on board and when the policy attached, and when the vessel started on her voyage from Olympia.

The doctrine is well settled both in this country and in England that the implied warranty of sea-

worthiness is complied with if the vessel is seaworthy at the inception of the voyage.

"There is an implied warranty that the vessel upon which the goods are loaded is seaworthy at the inception of the voyage."

Arnould on Marine Insurance (9th Ed.), Sec. 686.

"Seaworthiness at the inception of the voyage is all that is required, and there is no implied warranty that the vessel shall remain seaworthy during the voyage or at intermediate ports."

Arnould on Marine Insurance, Sec. 691.

Again—

"It is an established principle in this country, to which effect is given in Section 55 of the Marine Insurance Act, 1906, that, supposing the vessel, crew, and equipment to have been originally sufficient, and a captain to have been provided with competent skill, the underwriter is liable for any loss proximately caused by the perils insured against although it may have been remotely occasioned by the negligence or misconduct (not amounting to barratry) of the captain or crew, whether such negligence or misconduct consists in omitting some act which ought to be done or doing an act which ought not to be done in the course of navigation. The law is the same in the United States."

Arnould on Marine Insurance, Sec. 798.

The rule is stated in practically the same language in *Joyce on Insurance*, (2nd Ed.) Vol. 4, Sec. 2167.

Inasmuch as it is admitted that the vessel was seaworthy at the inception of the voyage and the implied warranty, therefore, fully complied with, the questions arising in the case are to be considered and determined irrespective of any warranty of seaworthiness.

II

The Proximate Cause of the Loss of Plaintiff in Error's Cargo Was the Foundering of the Ship and Was a Peril Covered by the Policy in Suit

Defendant contends, however, that the loss of the plaintiff's goods was not a loss through a peril of the sea, or other perils to which they were exposed on the voyage, within the meaning of the policy; but that the loss was caused by the alleged unseaworthy condition of the vessel by reason of the bad stowage of the goods taken on at Tacoma, and that this alleged unseaworthy condition of the vessel was the proximate cause of the loss. We contend on the contrary that the facts as disclosed by the testimony and as specifically found by the trial judge in his findings of fact, clearly show a loss by a marine peril and entitle the plaintiff to a recovery as a matter of law.

It is admitted that the vessel upon which plaintiff's goods were shipped foundered in the course of the voyage, and that its goods were totally lost as a result thereof. That the "sinking" or "foundering" of a vessel is a peril of the sea seems to us too plain to admit of argument.

See *Arnould on Marine Insurance*, (9th Ed.) Sec. 812.

The argument that the negligence or bad judgment of the master, if such has been shown, in the manner in which he distributed the cargo loaded aboard the vessel at Tacoma, whereby she is alleged to have become top heavy and unstable, is to be considered the proximate cause of the loss of the plaintiff's goods, is clearly untenable.

In the case of *Aetna Insurance Co. v. Sacramento & Stockton S. S. Co.*, 273 Fed. 55, 59, this court expressly held that where a vessel foundered in the course of a voyage, it was no defense to an action on an insurance policy to prove that the vessel at the time was unseaworthy, and that her foundering was caused by her unseaworthy condition, unless there was further proof that the unseaworthy condition was known to the owner and his conduct in sending her to sea amounted to a fraud.

The policy in that case was a time policy, and governed, as is the instant case, by English law and practice; and there, as here, no implied warranty of seaworthiness was involved. It was pleaded by the defendant that the vessel was unseaworthy at the time she foundered, with privity of the owner, and that the foundering was caused by her unseaworthiness; and testimony was offered to prove that the vessel foundered because of her unseaworthy condition. This testimony was rejected as constituting no defense—the foundering being held to be the proximate cause of the loss. This was but a recognition of the well settled rule that, when construing insurance policies, the proximate and not the remote cause of the loss will alone be considered; and that where goods are lost by the foundering of the vessel in which they were being shipped, the proximate cause of the loss is the sinking of the vessel, and the consequent contact of seawater with the goods. The courts will not look to the cause of the foundering—the remote cause of the proximate cause of the loss—unless there is a question of breach of warranty or of wilful and fraudulent misconduct upon the part of the owner.

The English rule in this respect was clearly settled by the early case of *Dixon v. Sadler*, 5 M. & W.

405, 151 Eng. Rep. 172. The facts in that case are very analogous to the facts in the case at bar, in so far as the principle of law under discussion is concerned. The ship "John Cook" was insured against perils of the sea on a voyage from Rotterdam to Sunderland. She was admittedly seaworthy at the inception of the voyage. On arrival at a point approximately four miles short of her destination, the master caused the crew to throw overboard a large part of the vessel's ballast, having in view the saving of time in removing ballast when he reached destination. After the ballast was overthrown and before the vessel reached destination, she encountered rough water which caused her to upset and subsequently sink and become a total loss. In an action on the policy the defendant pleaded that the vessel was not lost by perils of the sea; and, by a special plea, further set up:

"That the said wrecking, breaking, damaging, and injuring the said vessel, and the loss of the same by the perils of the sea as in the said first count mentioned, was occasioned wholly by the wilful, wrongful, negligent, and improper conduct (the same not being barratrous) of the master and mariners of the said ship, whilst the said ship was at sea as in the said first count mentioned, and before the same was wrecked, broken, damaged, injured, or lost as therein mentioned, to-wit, on the 19th of May, 1838, by wilfully, wrongfully, negligently, and improperly (but not barratrously)

throwing overboard so much of the ballast of the said ship, that by means thereof she became and was top-heavy, cranky, unfit to carry sail, and wholly unseaworthy, and unfit and unable to endure and encounter the perils of the sea which she might and would otherwise have been able to have safely encountered and endured, and by means and in consequence of the said wilful, wrongful, negligent, and improper (but not barratrous) conduct of the said master and mariners, the said ship became and was wrecked, broken, damaged, injured, and lost by perils of the sea, which perils, but for the said conduct of the said master and mariners, she could and would have safely encountered and overcome without being so wrecked, broken, damaged, injured, and lost as in the said first count is mentioned."

The verdict of the jury was entered in favor of the defendant upon this special plea and plaintiff thereupon moved for judgment *non obstante verdicto.*

It will be observed that the legal question presented in that case is identical with the question presented in the case at bar. In both cases it was alleged as a defense that, by the negligent, careless, or improper act of the master and mariners, after the voyage had been entered upon, the vessel was rendered tender, unfit to encounter the ordinary perils of the sea and unseaworthy—in the English case by throwing overboard ballast and in the instant case by taking on and improperly stow-

ing additional cargo. After being put in this condition by the negligent acts of the master and mariners, and without fault on the part of the insured in either instance, the vessel encountered conditions of the sea which in each instance she would have withstood successfully except for the unfit condition of the vessel by reason of being unstable and unseaworthy. In the case cited, the plea which was sustained by the verdict of the jury expressly alleged that except for the said conduct of the master and mariners, the vessel could and would have safely encountered and overcome the seas subsequently encountered without being wrecked, injured, or lost. In the case at bar, the court has assumed that except for the method of loading and stowing cargo at Tacoma, the vessel would have safely overcome the conditions encountered in the tide-rips and cross-currents described by the witnesses and which caused her to capsize. In the case cited, Mr. Justice Parke said:

"If the crew had not removed the ballast, the ship would most likely have stood the squall. It was objected at the trial that this was not a risk which the underwriters had undertaken to indemnify against. * * *

"The question depends altogether upon the nature of the implied warranty as to seaworthiness, or mode of navigation, between the assured and the underwriter, on a time policy. In the case of an

insurance for a certain voyage, it is clearly established that there is an implied warranty that the vessel shall be seaworthy, by which it is meant that she shall be in a fit state as to repairs, equipment, and crew, and in all other respects, to encounted the ordinary perils of the voyage insured, at the time of sailing upon it. If the assurance attaches before the voyage commences, it is enough that the state of the ship be commensurate to the then risk. * * * And if the voyage be such as to require a different complement of men, or state of equipment, in different parts of it, as, if it were a voyage down a canal or river, and thence across to the open sea, it would be enough if the vessel were, at the commencement of each stage of the navigation, properly manned and equipped for it. But the assured makes no warranty to the underwriters that the vessel shall continue seaworthy, or that the master or crew shall do their duty during the voyage; and their negligence or misconduct is no defense to an action on the policy, where the loss has been immediately occasioned by the perils insured against. This principle is now clearly established by the cases (citing a number of English cases); nor can any distinction be made between the omission by the master and crew to do an act which ought to be done, or the doing an act which ought not, in the course of the navigation. It matters not whether a fire which causes a loss be lighted improperly, or, after being properly lighted, be negligently attended; whether the loss of an anchor, which renders the vessel unseaworthy, be attributable to the omission to take proper care of it, or to the improper act of shipping it, or cutting it away; nor could it make any difference whether any other part of the equipment were lost by mere neglect, or thrown away or destroyed, in the exercise of an improper discretion, by those on board. If there be any fault in the

crew, whether of omission or commission, the assured is not to be responsible for its consequences. * * *

"The great principle established by the more recent decisions is, that, if the vessel, crew, and equipment be originally sufficient, the assured has done all that he contracted to do, and is not responsible for the subsequent deficiency occasioned by any neglect or misconduct of the master or crew; and this principle prevents many nice and difficult inquiries, and causes a more complete indemnity to the assured, which is the object of the contract of insurance. If the case, then, were that of a policy for a particular voyage, there would be no question as to the insufficiency of the plea; and the only remaining point is, whether the circumstances of this being a time policy makes a difference."

The case was again argued and the decision of the court announced by Chief Justice Tindal in 8 M. & W., 895. After stating the pleadings, the court says:

"The question, therefore, in substance becomes this: whether the throwing the ballast overboard by the master and crew (which must be considered as their voluntary act, and also a negligent and improper act), whereby the ship became unseaworthy, excuses the underwriter. It is obvious that such an act (all unlawful motive being excluded by express averment) may be attributable to an error or defect in judgment, both as to the fact of discharging the ballast at all, and further, as to the exact extent to which it was actually discharged; and it seems difficult, on principle, to hold that the underwriter shall be excused where the loss is occasioned by the mere want of judgment or the

negligence of the master and mariners—which occurred in this particular case—and that he shall not be also held to be excused in every case, where the loss can be traced to mistake of judgment, or an act of carelessness or negligence in the ordinary navigation of the vessel; in which latter cases the loss is confessedly held to fall within the meaning of perils of the sea.

"But without entering into a further discussion of the principle, we think, upon the later authorities, the rule is established, that there is no implied warranty on the part of the assured for the continuance of the seaworthiness of the vessel, or for the performance of their duty by the master and crew during the whole course of the voyage."

Judgment was accordingly entered for the plaintiff on the policy. This decision has been recognized as standard authority in the law of England upon marine insurance since the date of its rendition.

Another case directly in point upon the principle involved is that of *Dudgeon v. Pembroke*, L. R. 1 Q. B. Div. 96; L. R. 2 App. Cas. 284; 3 Asp. Mar. L. Cases 393.

In this case, a vessel was insured under a time policy, and the court held that under the English law, there was no implied warranty of seaworthiness in such policy. It was argued there, as it has been in the case at bar, that the loss of the vessel was caused by her unseaworthy condition at the

time of the accident and, therefore, not by a peril insured against.

In that case, by reason of the unfit condition of the vessel during one of her voyages, she was driven ashore by the force of the wind and waves and finally broke up and went to pieces. In that case, the question presented to the House of Lords was whether the underwriter was liable under the ordinary marine insurance policy for a loss immediately and directly caused by the sea but resulting wholly from the unseaworthy condition of the vessel, there being in the case no express or implied warranty of seaworthiness. Lord Penzance, in delivering the opinion which prevailed in the House of Lords, said:

"In discussing such a question it must be assumed, as it was admitted by the appellant that it should be, for the sake of argument, that the vessel was not seaworthy, and that her want of seaworthiness caused her to be unable to encounter successfully the perils of the sea and so to perish. The question therefore is in substance the same as that raised by the sixth plea, or rather so much of it as the jury found to be proved, namely that the 'vessel sailed from London in a wholly unseaworthy condition on the voyage on which she was lost,' and that the ship 'was lost as alleged by reason of such unseaworthiness.' For this plea must be understood to mean not that the vessel did not perish immediately by the action of the winds and waves (if it did it was certainly not sustained by the

facts), but that the loss by these perils of the sea was brought about by the vessel's unseaworthiness. It will at once occur to your Lordships upon the raising of such a question that in regard to a voyage policy as to a time policy, if a loss proximately caused by the sea, but more remotely and substantially brought about by the condition of the ship, is a loss for which the underwriters are not liable, then quite independent of the warranty of seaworthiness which applies only to the commencement of the risk the underwriters would be at liberty in every case of a voyage policy to raise and litigate the question whether at the time the loss happened the vessel was by reason of any insufficiency at the time of her last leaving a port where she might have been repaired, unable to meet the perils of the sea, and was lost by reason of that inability. If such be the law, my Lords, the underwriters have been signally supine in availing themselves of it, for there is no case that I am aware of except those to which I have referred, in which anything like such a defence as this has been set up. The materials for such a defence must have existed in countless instances, and yet there is no trace of it in any case which has been brought to your Lordships' notice, still less any decision upholding such a doctrine. * * *"

"In the total absence then of all authority, and in the fact that this defense is a new one, I find sufficient reason for advising your Lordships, not now for the first time to sanction a doctrine which would entirely alter the hitherto accepted obligations between underwriter and assured.

"It was said by one of the learned judges in the Exchequer Chamber that the unseaworthiness of the ship at the commencement of the voyage which really caused the loss is a fact the consequences of which are imputed to the assured and were to be borne by him and not the underwriters. But the

question as it seems to me is not what losses ought in the abstract to be borne by the assured as being imputable to him or his agents on the one hand, or by the underwriters as being caused by the elements on the other hand, but what losses they have mutually agreed should be borne by the underwriters in return for the premium they have received. These losses are in the contract of the insurance amongst others declared to be all losses by perils of the sea. A long course of decisions in the courts of this country have established that *causa proxima non remota spectatur* is the maxim by which these contracts of insurance are to be construed, and that any loss caused immediately by the perils of the sea is within the policy, though it would not have occurred but for the concurrent action of some other cause which is not within it. It is I conceive far too late for your Lordships now to question this construction of the underwriters' obligation, if indeed you were disposed to do so."

After referring to the case of *Thompson v. Hopper*, (6 E. & B 172), and pointing out that that decision was based on the fact that the shipowner himself knowingly and wilfully sent the ship to sea in an unseaworthy state, he proceeded:

"It is only necessary to observe upon that case that the knowledge and wilful misconduct of the assured himself was an essential element in the decision arrived at. There is no case that warrants your Lordships in going further, and on the other hand it is easy to see that the arguments employed in this case, if sanctioned by judicial decision, would result in relieving the underwriters from many other losses to which they have hitherto been liable. For instance, the assured has always been

held protected from loss from the perils insured against, though that loss was brought about through the negligence of his captain or crew. Now, the captain has the entire control of the vessel in respect of repairs in foreign ports as of everything else, and if the sixth plea in this case were held to be sufficient, without proof of the shipowner's knowledge and wilfulness, the result would be that whenever the captain failed in his duty in fitly repairing the vessel in a foreign port, and the loss, though caused by perils of the sea, could be traced to the ship's defective condition, the assured would lose the benefit of his policy. Such a doctrine once established would extend equally to the negligent conduct of the ship in the course sailed by her, or her careless management in emergency, or the absence of reasonable and proper exertion on the part of the captain or crew."

We respectfully submit that the case at bar is not distinguishable in principle from *Dudgeon v. Pembroke*, *Dixon v. Sadler*, or *Aetna Ins. Co. v. Sac. & S. S. S. Co.*, *supra*, and as the policy itself provides that loss and liability shall be settled in accordance with English law and usage, the plaintiff in the case was clearly entitled to recover.

The case of *Dudgeon v. Pembroke* was cited by the Supreme Court of the United States in *H. E. & P. Co. v. Philippine Islands*, 219 U. S. 17, as correctly laying down the doctrine that under insurance policies, the courts refuse to look behind the immediate cause of the loss to remoter negligence of the insured.

In the case at bar, the goods of the plaintiff were neither lost nor damaged by the loading of the vessel at Tacoma, whether that loading was improper or not. They were lost solely by contact with the sea, caused by the capsizing of the vessel. This was the immediate cause of their loss, or, as stated by the courts, the *causa proxima.* The fact that the capsizing may be traceable, either in whole or in part, to the negligent act of the master and seamen in the manner of loading and trimming the vessel at the intermediate port of Tacoma is wholly immaterial, inasmuch as it is at most an indirect and remote cause and not the immediate, direct, and proximate cause of the loss.

In *Walker v. Maitland,* 5 B. & A. 171; 106 Eng. Rep. 1155, the rule is again clearly stated. In that case, a small schooner ran ashore, due solely to the fact that the crew on watch negligently went to sleep so that there was no one directing the course of the schooner. Mr. Justice Bayley said:

"It is the duty of an owner to have the ship properly equipped and for that purpose it is necessary that he should provide a competent master and crew in the first instance. But having done that, he has discharged his duty and is not responsible for their negligence as between him and the underwriter."

And Justice Holroyd, in the same case, said:

"The rule of law is that *proxima causa non remota spectatur*, and here the proximate cause of the loss, was a peril of the sea. The question is whether the underwriters are liable for a loss proceeding directly from a peril of the sea but remotely from the negligence of the crew. * * * It is sufficient if the owners provide a master and crew generally competent; there is no implied warranty that such a crew shall not be guilty of negligence."

The same rule is imposed in the English Marine Insurance Act of 1906. Section 55 (2a) of that act provides:

"The insurer is not liable for any loss attributable to the wilful misconduct of the assured but unless the policy otherwise provides, he is liable for any loss proximately caused by a peril insured against even though the loss would not have happened but for the misconduct or negligence of the master or crew."

Also in the case of *Trinder, Anderson & Co. v. T. & M. Ins. Co.*, decided in 1898, 67 L. J., Q. B., N. S. 666; 8 Asp. Mar. Cas. 273, the authority of the cases of *Dixon v. Sadler*, and *Dudgeon v. Pembroke* was re-affirmed as the established law of England. In that case, the vessel had been stranded by the negligent navigation of the master who was also part owner of the vessel. Defendant contended that the stranding in such conditions was not a peril of the sea within the policy. The court re-

affirmed the doctrine of the cases previously cited and held that the stranding was the immediate cause of the loss or the *causa proxima* and negligence of the navigating officers, of which the stranding was a consequence, was a remote cause.

The principle is illustrated by the case of collision between two vessels as a result of the fault or negligence of the master and mariners of the insured vessel. It was for a long time contended that such a loss was not a peril of the sea and covered by the ordinary marine insurance; but that question has long since been set at rest both in England and in America. The leading English case is that of *Wilson v. Xantho*, 12 A. C. 503, decided by the House of Lords in 1887. Lord Herschell, in moving for judgment in favor of the assured in the House of Lords, said:

"I think it clear that the term perils of the sea does not cover every accident or casualty which may happen to the subject matter of the insurance on the sea. It must be a peril 'of' the sea. Again, it is well settled that it is not every loss or damage of which the sea is the immediate cause that is covered by these words. They do not protect, for example, against that natural and inevitable action of the winds and waves which results in what may be described as wear and tear. There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure. The purpose of the policy is to secure

an indemnity against accidents which may happen, not against events which must happen. It was contended that those losses only were losses by perils of the sea which were occasioned by extraordinary violence of the winds or waves. I think this is too narrow a construction of the words, and it is certainly not supported by the authorities or by the common understanding. It is beyond question that if a vessel strikes upon a sunken rock in fair weather and sinks, this is a loss by perils of the sea. And a loss by foundering owing to a vessel coming into collision with another vessel, even when the collision results from the negligence of that other vessel, falls within the same category. Indeed, I am aware of only one case which throws a doubt upon the proposition that every loss by incursion of the sea due to a vessel coming accidentally (using that word in its popular sense) into contact with a foreign body which penetrates it and causes a leak, is a loss by perils of the sea. * * * Now I quite agree that in a case of a marine policy the *causa proxima* alone is considered. If that which immediately causes the loss was a peril of the sea, it matters not how it was induced, even if it were by the negligence of those navigating the vessel."

And referring to the older case of *Woodley v. Mitchell*, which had held to the contrary, his Lordship said:

"I am unable to agree in the view that a disaster which happens from the fault of somebody can never be an accident or peril of the sea; and I think it would give rise to distinctions resting on no sound basis if it were to be held that the exception of perils of the sea in a bill of lading was always excluded when the inroad of the sea which

occasioned the loss was induced by some intervention of human agency. Taking the case which I put in the course of the argument, of a ship which strikes upon a rock and is lost because the light which should have warned the mariner against it has become extinguished owing to the negligence of the person in charge. Why should this not be within the exception, whilst a similar loss arising from a vessel coming in contact with a rock not marked upon the chart admittedly would be? And what special distinction is there between this latter case and that of a vessel foundering through collision with a ship at anchor left at night without lights? For these reasons I have arrived at the conclusion that the case of Woodley v. Mitchell cannot be supported."

In the same case, Lord Bramwell said:

"It was admitted by the plaintiffs that the vessel sank owing to damage received in a collision. It was admitted by the defendants that that collision was not the result of unavoidable accident, i. e., the winds and waves or other natural causes." " * * * Was it by a peril of the sea that the defendant ship foundered? The facts are that the sea water flowed into her through a hole and flowed in such quantities that she sank. It seems to me that the bare statement shows that she went to the bottom through a peril of the sea. If the hole had been simply from being a piece of bad wood, a plank starting, or a similar cause, it would be called a leak, and no one would doubt that she foundered from a peril of the sea. Does it make any difference that the hole was large and occasioned by collision? I cannot think it does. It is admitted that if the question had arisen on an insurance against loss by perils of the sea, this would have been within the policy a loss by perils of the sea." * * *

"The argument is that wind and waves did not cause the loss, but negligence in someone. But surely if that were so, a loss by striking in calm weather on a sunken rock not marked on the chart would not be a loss by perils of the sea within the bill of lading, or striking on a rock from which the light had been removed, or an iceberg, or a vessel without lights. I cannot bring myself to see that such cases are not losses by perils of the sea. Is not the chance of being run against by a clumsy rider one of the perils of hunting? It would be strange if an underwriter on cargo suing in the name of the cargo owners on a bill of lading, should say, 'I have paid for a loss by perils of the sea and claim on you because the loss was not by perils of the sea.' The Court of Appeals with great respect argued as though the collision caused the loss. So it did in a sense. It was *causa sine qua non*, but it was not the *causa causans*. It was *causa remota*, but not *causa proxima*. The *causa proxima* of the loss was foundering."

In *Redman v. Wilson*, 12 M. & W., 476, a ship insured on a voyage out and home, "had been seaworthy at the commencement of the risk, but at Sierra Leone had been so unskilfully loaded by the native lumpers, that on commencing her voyage home, she was found unable to keep the sea, and was run ashore in order to prevent her sinking in the Leone river. The court, upon the same principle as in the previous cases, held the underwriters liable for the loss.

Arnould (9th Ed.) p. 997.

And *Gibson v. Burnand*, L. R. 4 C. P. 117, where the crew negligently left open the sea cocks or valves, through which water entered the ship, and caused the loss.

The *Ionides* case (*Ionides v. N. W. Assn.*, 32 L. J. C. 173) also illustrates the principle that the court will not look beyond the efficient, proximate cause of the loss. The policy was upon cargo, and contained a clause "warranted free from capture," etc., and "free from all the consequences of hostilities, riots, and commotions." A lighthouse had been constantly maintained at Cape Hatteras, which was relied upon by masters in navigating around the Cape; but at the time of the accident involved in the action, the Confederate authorities had put out this light for a hostile purpose. As a consequence of the absence of this light, the ship ran ashore and was lost, a part of the goods being also lost in the stranding, and a part seized by the Confederate military forces. The court said it would "take as a fact for the purpose of the judgment that if there had been a light on Cape Hatteras, the captain could have seen it and could have put his ship about, and if he could have seen it and could have put his ship about, that the ship would not have been lost in the manner in which it was." Not-

withstanding the broad language of the warranty, the court held that the stranding was not a consequence of hostilities.

The case of *Orient Insurance Company v. Adams*, 123 U. S. 67, is also clear on this subject. There a steamer navigating upon the Ohio River was insured against the perils of the river. She was temporarily tied up at a dock while certain repairs were made to her machinery. The master of the vessel ordered the lines let go without making inquiry to ascertain whether the vessel had steam or not,—as a result of which the vessel, having insufficient steam for navigation, drifted with the current of the river a short distance over some falls and was damaged. The steamer being without steam was, of course, unseaworthy to navigate the river and as a result of such unseaworthy condition and by the normal and natural current of the river, was carried over the falls. The court held that the proximate cause of the loss was the sinking of the vessel as a result of the damage received by being swept over the falls by the current of the river, the negligence of the master being only the remote cause of the loss. The trial court instructed the jury as follows:

"Where a loss under a policy of insurance such as the one in suit happens from the perils of the river, it is not a defense to the insurance company that the remote cause of the loss was the negligence of the insured or his agents. * * * The mere fault or negligence of the captain of the vessel by which the 'Alice' was drifted into the current and drawn over the falls will not constitute a defense to the company, unless the jury should be satisfied that the captain acted fraudulently or wilfully, with design in so doing. * * * If the proximate cause of the loss was the stranding of the vessel, this was covered by the policy and the defendant is not relieved from liability by showing that the loss was remotely ascribable to the negligence of the captain or the other officers or employees."

The Supreme Court, in overruling exceptions to these instructions, said:

"We do not perceive anything in these instructions of which the insurance company can rightfully complain. The court proceeded upon the ground that if the efficient and, therefore, the proximate cause, of the loss was the peril of the river, the company could not escape liability by showing that the loss was remotely caused by mere negligence in not ascertaining before giving the signal to let the vessel go, that she had steam enough for her proper management. The court committed no error in so ruling."

It will be noted that in the above case there was nothing unusual, unavoidable, or not to be anticipated in the action of the water of the river which carried this vessel over the falls. A vessel without

steam cast into the current of the river will normally, naturally, and inevitably drift with that current and over any falls that exist in the river. That the loss in that case was in a sense attributable to the action of the master in having the vessel cast off into the current without any steam is, of course, perfectly clear. The court, however, held that the loss of the vessel was caused by the sinking, as a result of the damages sustained in going over the falls, and that that was the proximate cause of the loss and was a peril of the river notwithstanding the fact that the drifting of the vessel over the falls was an inevitable consequence of the action of the master in casting her adrift into the current without steam.

So, in *Crescent Ins. Co. v. Vicksburg, etc., Co.*, 69 Miss. 208, 13 So. Rep. 254, the policy was on cargo of cotton and worded identically as in the case at bar. In transferring cotton bales to a connecting boat, by the negligence of the crew, the boat listed and a portion of the cotton was thrown into the river and damaged. Applying the principle of *causa proxima*, the court said:

"The injury to the cotton by water of the river into which it was thrown by mishap of the boat was a peril of the river. If it be true that the careening of the boat resulted from negligence in unloading,

the insurer is liable. * * * The immediate cause of injury to the cotton was water of the river. That it got into the river because of some carelessness or unskillfulnes of those engaged in unloading does not relieve the insurer from liability. To relieve from liability, there must be want of good faith and honesty of purpose. Where a peril of the sea is the proximate cause of the loss, the negligence which caused the peril is not inquired into."

The same general principle is stated by this court in *American Hawaiian S. S. Co. v. Bennett*, 207 Fed. 510, as follows:

"Assuming that there was such negligence * * * it was, we think, clearly a loss against which the owner was insured by the policy held by it. 'A policy of insurance against perils of the sea covers a loss by stranding or collision although arising from the negligence of the master or the crew, because the assurer assumes to indemnify the assured against losses by particular perils and the assured does not warrant that his servants will use due care to avoid them.' Liverpool, Etc., Co. v. Ins. Co., 129 U. S. 397. * * * In 26 Cyc. 660, it is said, 'The general rule is that where the immediate cause of a loss is a peril of the sea insured against, the underwriters are liable notwithstanding such loss would not have occurred except for the negligence of the insurer or that of the master, crew, or other agents or servants', citing a large number of cases. That the unexpected striking and stranding of the vessel in tidal waters is a peril of the sea, does not admit of question. Fletcher v. Englis, 2 B. & Ald. 315; Letchford v. Holdon, 5 Q. B. D. 538."

In the case at bar, the most that can be said under the testimony is that if the cargo put on the

vessel at Tacoma had been loaded somewhat differently, the vessel might have withstood the action of the cross-currents or tide-rips without capsizing. The effect of such cross-currents upon the navigation of small vessels the size of the "Rubiayat" varies so much that it is impossible for anyone to say with any degree of certainty what would have happened if the vessel had been loaded or trimmed differently. These currents or rips, as shown by the testimony, sometimes extend down to a depth of eight or more feet and necessarily endanger the navigation of small steamers. Sometimes they are barely perceptible on the surface while at other times they are small whirlpools. The steamer changed her course when she struck these currents with a view to heading into the current. It is possible or even probable that the accident to the steamer was caused solely by the combined effect of these cross-currents, the action of the master in changing his course, and his action in throwing his helm hard over at the time the vessel took the first list to port. Apparently this action of the helm caused the vessel to react from her list to port into an extreme list to starboard, and that was accentuated by these disturbing cross-currents through which he was passing, and the turn-

ing movement of the steamer, and she capsized as a result. Whether she would have capsized if she had been loaded or trimmed somewhat differently is merely a matter of conjecture. It seems to us that the contention put forth in this case that this capsizing of the vessel under these conditions was not a peril of the sea and, therefore, that the loss of these goods did not come within the terms of this policy is wholly untenable. The plaintiff here is not the owner of the vessel but the shipper of cargo, and while it is true that the shipper in a policy on goods is bound by the implied warranty of seaworthiness at the inception of the voyage to the same extent as is the owner of a vessel in a policy on a vessel, yet it would seem to be an exceedingly harsh doctrine which would deprive the shipper of the protection of his policy notwithstanding his precaution in seeing that the vessel upon which his goods were shipped was initially seaworthy, because of the subsequent negligent or careless act of the master of the ship over whose conduct the shipper has no control and for whose actions he is in no way responsible.

The purpose of marine insurance as between a shipper of cargo and the underwriter is to afford complete protection to the shipper against all of

the marine risks incident to the voyage, provided only the vessel was seaworthy at the inception of the voyage and the attaching of the policy. The policy, by its express language, covers not only perils of the sea, strictly so-called, fire and barratry, but also "all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage" of the goods insured.

When a seaworthy vessel leaves port on her voyage, there are certain risks inevitably incident to the voyage. One is that the vessel may encounter a storm that will break her up and drive her ashore. In such case, the policy is intended to protect the shipper. She may run onto a sunken rock and sink, or she may, with or without the negligence and carelessness of her navigators, come into collision with another vessel and sink, or by the carelessness and negligence of her navigators, she may run on shore and result in a total loss. In all of these instances it is admitted that the policy covers the risk. There is also the danger that vermin may be aboard the ship and may gnaw a hole into a pipe, letting seawater into the ship and thereby damaging or destroying the goods. The courts have held that this loss is one covered by the policy.

Where a vessel enters upon a voyage which contemplates her stopping at intermediate ports, it is known that she either will or may take on or discharge cargo at these intermediate ports, and that the amount of cargo taken on and the manner in which it will be stowed in the vessel are matters which depend upon the judgment of the master in charge. There is, of course, always the risk that he may show bad judgment in the manner in which these goods may be stowed on the vessel, resulting in the vessel being unstable and out of trim, and which may ultimately cause the steamer to be unable to withstand the action of the sea on some part of the remaining voyage. That is a risk necessarily incident to shipping on the water. Why should it not be considered as covered by the broad language of this policy, which, as stated, covers not only perils of the sea technically but "all other perils, losses and misfortunes" which shall come to the damage of the goods?

The lower court having found that the implied warranty of seaworthiness had been fully complied with at the inception of the voyage and that the vessel at the time of sailing from Olympia was fully manned and equipped to successfully encounter the usual and ordinary incidents of such a voy-

age, further found that said vessel was unskilfully stowed at the intermediate port of Tacoma so as to render her top-heavy and unstable, and that in such top-heavy and unstable condition, she was unable to successfully encounter the tidal and cross-currents in Tacoma Harbor. And the lower court held as a conclusion of law that such tidal and cross-currents were not a peril of the sea within the policy in suit.

The error of the lower court, we think, is perfectly apparent. Instead of considering the proximate cause of the loss, the lower court confined its findings and conclusions to the remote cause of said loss. If plaintiff in error's contention that the foundering of the vessel was the proximate cause of the loss of its goods, is sound, then the lower court's findings and conclusions with reference to the prior negligent stowage is entirely immaterial as, at most, such negligence was a remote cause in the chain of circumstances leading up to the ultimate loss of the plaintiff in error's goods. As was said by Lord Bramwell in *Wilson v. Xantho, supra*:

"The Court of Appeals with great respect argued as though the collision caused the loss. So it did in a sense. It was *causa sine qua non*, but it was not the *causa causans*. It was *causa remota*, but not

causa proxima. The *causa proxima* of the loss was foundering."

And, as said by Justice Holroyd in *Walker v. Maitland, supra*:

"The rule of law is that *proxima causa non remota spectatur*, and here the proximate cause of the loss, was a peril of the sea."

So, in the case at bar, the immediate proximate cause of the loss was the foundering of the ship and such cause undoubtedly was a peril of the sea and, therefore, within the coverage of the policy, and the courts will not look beyond such cause to determine the remote cause leading up to said foundering.

The case is squarely within the language of Lord Penzance, in *Dudgeon v. Pembroke*, that "any loss caused immediately by the perils of the sea is within the policy, though it would not have occurred but for the concurrent action of some other cause which is not within it."

With all due respect to the trial court, we submit that said court did not consider or pass upon the point which was really involved in this litigation. It never determined the proximate cause of the loss but confined its inquiry entirely and exclusively to the remote cause or causes leading up to the proximate cause of said loss.

We respectfully submit that the seaworthiness of the vessel at the inception of the voyage being admitted and the proximate cause of the loss of plaintiff in error's goods being due to the foundering of the vessel, the remote cause or causes leading up to said foundering are entirely immaterial and that the decree of the lower court should be reversed and judgment entered in favor of the plaintiff in error.

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No. 4679

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

OLYMPIA CANNING COMPANY, a corporation,
Plaintiff in Error,

vs.

THE UNION MARINE INSURANCE COMPANY, LTD., a corporation,
Defendant in Error.

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

BRIEF FOR DEFENDANT IN ERROR.

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FILED
OCT 30 1925
F. D. MONCKTON

Parker Printing Company, 523 Clay Street, San Francisco

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BRIEF FOR DEFENDANT IN ERROR.

This case, though dealing with a maritime subject, is not an admiralty case, but was brought by plaintiff at common law. Hence, as distinguished from the rule in admiralty cases, the District Court's findings of fact are conclusive, if there is *any* evidence to support the same and no review of the evidence in detail is necessary, the sole question (in our opinion) being whether the findings support the judgment. And this, as will be seen, raises *only* the legal question, raised by plaintiff's demurrer to defendant's answer, namely, whether

the sinking of a vessel shortly after leaving her dock, in fair weather and on a calm sea, can be said to be a loss by "perils of the sea", insured against in the policy sued on.

THE PLEADINGS AND FINDINGS.

The complaint, after alleging the issuance of defendant's marine policy insuring plaintiff's cargoes against the usual marine perils, sets forth the shipment of certain canned goods by plaintiff on the small steamer "Rubaiyat" at Olympia, Washington, for a voyage from there to Seattle and alleges that, while on said voyage, said vessel sank by reason of perils insured against and plaintiff's cargo became a total loss.

Defendant's answer admits practically all the allegations of the complaint, simply denying any loss by perils insured against and sets up the following affirmative defense (Record, pp. 19-20):

> "That said vessel, the S. S. 'Rubaiyat', on September 29, 1923, sailed from the port of Olympia, Washington, bound for Seattle via Tacoma, having on board at the time of sailing from Olympia the cargo mentioned in plaintiff's complaint; that said vessel on said voyage called at the port of Tacoma and there took on board additional cargo, to wit: gypsum in sax, plaster in sax and other cargo; that the cargo taken on board said vessel at Tacoma was so improperly stowed on the vessel as to make her topheavy, unstable, tender and unfitted to continue the voyage; that a few minutes after leaving the dock at Tacoma bound for Seattle, she capsized and sunk and with her cargo became a total loss; that at the time the sea was

calm and the weather fair; that the capsizing and sinking of said vessel and the loss of said cargo was caused solely by her said topheavy, unstable, tender and unfit condition, and was not caused by perils of the seas or any other perils or risks covered by the contract of insurance mentioned in plaintiff's complaint."

Plaintiff demurred to this affirmative defense and, after extensive briefs had been filed thereon, the court, in a well reasoned decision, overruled said demurrer, holding that a loss occurring on a calm, clear day, caused solely by overloading, was not a loss by perils of the sea (Record, pp. 21-26). The opinion will well repay perusal.

The case then went to trial and, after evidence had been taken, the court found, *inter alia,* the following facts (Record, pp. 35-37):

"That when said vessel left Tacoma she was so heavily loaded that at her ports she had only about six inches freeboard which was the maximum she could be put down with safety, and she was deeper down on this voyage than on any previous voyage; that there was ample room below to have put all the cargo that was stowed on the upper deck.

"That as said vessel backed out of her dock in the Waterway at Tacoma, she encountered the wash or displacement waves of the steamer 'Indianapolis', which last-named vessel had previously entered the waterway and was then coming to her mooring at the municipal dock on the opposite side of the waterway; that such wash or displacement waves did not cause any undue rolling or indicate crankiness or tenderness of the vessel; that said vessel then proceeded for about four-

teen minutes and for a distance of about two and one-half miles, and without meeting any other vessel, to a point in Commencement Bay, where certain well-known tidal currents exist and a current caused by the waters of the Puyallup River emptying into said Bay. Upon reaching this point her master brought her wheel over one-half point to change her course, whereupon the vessel suddenly took a list to port, then gradually went over to starboard, filled up with water, capsized and sunk, both vessel and cargo becoming a total loss.

"That at the time the surface of the water was calm and the weather was fair and clear. That the listing, capsizing and sinking of the vessel was caused by her being in so topheavy, unstable, tender and unfit condition, due to the improper manner in which the cargo taken on at Tacoma was stowed aboard her as to be unable to withstand the effect of said tidal or cross-currents and was not caused by perils of the seas, or any other perils or risks covered by the contract of insurance hereinbefore mentioned."

Upon these facts judgment was entered for the defendant.

THE EVIDENCE AMPLY SUPPORTS THE FINDINGS AND THE LATTER ARE THEREFORE NOT OPEN TO ATTACK ON THIS APPEAL.

Section 649 of the Revised Statutes provides that:

"The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

In other words, such findings are *conclusive* if there is *any* evidence to support them and cannot be reexamined by the appellate court.

In *Stanley v. Board of Supervisors of the County of Albany,* 121 U. S. 535; 30 L. Ed. 1000, 1002-3, the Supreme Court says:

> "Several of the assignments of error presented for our consideration are to rulings of the court below upon the evidence before it; to its findings of particular facts; and to its refusal to find other facts. Such rulings are not open to review here; they can be considered only by the court below. Where a case is tried by the court without a jury, its findings upon questions of fact are conclusive here; it matters not how convincing the argument that upon the evidence the findings should have been different."

In *Pacific Postal Tel. Co. v. Fleischner,* 66 Fed. 899, 902-3, this court says:

> "Plaintiff in error excepted to the 2d, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, and 13th, and to parts of the 4th and 5th, findings of fact on the ground 'that they are each and all contrary to the evidence, and that there is no evidence to support such finding and findings'. Plaintiff in error also excepted to the conclusions of law in the case. The ruling of the court in making these findings and in overruling plaintiff's exceptions to the same is assigned as error. This is an attempt to have this court re-examine the evidence in this case, and determine whether or not it supports the findings of the circuit court."
>
> "Section 649, Rev. St., is as follows:
>
> 'Issues of fact in civil cases in any circuit court may be tried and determined by the court

> without the intervention of a jury, whenever the parties or their attorneys of record file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts which may be either general or special, shall have the same effect as the verdict of a jury.'
>
> "The seventh amendment to the constitution of the United States provides that:
>
> 'No fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.'
>
> "According to such rules, it could only be re-examined where the court in which the trial was had granted a new trial for sufficient reasons, or the appellate court awarded a venire facias de novo for some error which intervened in the proceedings. Parsons v. Bedford, 3 Pet. 433; Bassette v. U. S., 9 Wall. 38; Insurance Co. v. Folsom, 18 Wall. 237. Giving the findings of a court the same effect as the verdict of a jury and it is evident that this court cannot review the evidence, and determine whether they are supported thereby."

See also, *2 Fed. Statutes Ann.*, 2 ed. p. 215 and numerous cases there cited.

This point is elementary and needs no further comment.

It is therefore superfluous to review the evidence in this case or to refer to the partisan statement thereof in plaintiff in error's brief. It will suffice to say that Captain Ryan of the "Rubaiyat" testified before the United States Inspectors (all of the testimony there adduced being admitted by stipulation at the trial) that she had never carried so much gypsum before, that

she had only about six inches freeboard from the main deck which was the maximum she could be loaded with safety, that she had never been loaded any deeper and that she was deeper by the ports than on previous voyages (Record, pp. 68-69). He also testified that, in addition to carrying 122 tons of cargo (Id. p. 68), she had 15 tons of rock ballast in her (Id. p. 70), so that she had more deadweight tonnage in her than her deadweight capacity of 130 tons (Id. p. 68). Captain Lovejoy, the owner of the vessel, admitted that the improper distribution of her cargo was "probably a big factor" in her capsizing (Id. p. 74) and Captain Ryan admitted that, if he were loading her again, he would not put any cargo on the upper deck (Id. p. 72).

Captain Ryan, like all the other witnesses admitted that there was no sea and hardly any wind (Id. p. 70) and at the trial further testified that it was "perfectly calm" (Id. p. 56).

Under these circumstances, the court's findings that the boat was overloaded and that she sank on a calm day, with the weather fair and clear (Id. pp. 35-36), cannot be impeached in this court.

The court also found that, at the point of sinking (in Tacoma harbor), there were certain *well known* tidal currents and a current caused by the waters of the Puyallup River, which the vessel, loaded as she was, was unable to withstand (Id. p. 36), but it also found that these currents were not perils of the sea or any other perils insured against (Id.), which finding is also conclusive.

Plaintiff in error makes much of the alleged currents in its brief, stating that they "sometimes extend down to a depth of eight or more feet" and that sometimes they are "small whirlpools" (Brief, p. 36). The trial court, however, made no such findings and whatever testimony there may be in that regard is grossly exaggerated and is on a par with the testimony that the "Indianapolis" threw "a displacement wave of some six feet swell" (Brief, p. 4). In view of the number of vessels that go safely out of Tacoma harbor every day of the year, this testimony is, on its face, unworthy of credence and the District Court was entitled to disbelieve it, as it undoubtedly did.

The currents in question were only testified to by Captain Lovejoy (Record, pp. 50-51), who was not aboard the vessel at the time of her loss, and he admitted before the inspectors that these conditions were well known and the "Rubaiyat" was designed to meet them (Id. p. 75) and at the trial that "they are not very strong" (Id. p. 51). Captain Ryan said not one word before the inspectors about these currents (Id. p. 73) and, in fact, expressly stated that *"he was unable to determine the cause of the vessel foundering"* (Id. p. 72). After Captain Lovejoy had given his belated testimony at the trial, Captain Ryan was recalled for further examination by the *court* and gave the following significant testimony (Record, p. 56):

> "Q. (By the Court). *What was the condition of the water just before the vessel listed?*
> A. *It was perfectly calm.*

Q. *It was perfectly calm?* A. *Yes, sir.*
Q. *No current or waves of any sort?*
A. *There is always that current there.*
Q. *What current?*
A. *The cross-current from the river coming in at that point.*
Q. *What was the condition of that cross-current there?*
A. *Well, it is really hard to see the condition of the current.*''

It is further significant that no witness *observed* the currents on the day in question and it is also to be remembered that they are *always* present in Tacoma harbor. It was, as the court found, ''*a well-known* tidal current'' (Id. p. 36), of no significance whatever, and was relied on by plaintiff at the trial as a last desperate hope to save its case from the ruling on demurrer. It is submitted that, if such a current, operating on *all* vessels *ever* leaving Tacoma, is a ''peril of the seas'', insurance companies had best stop doing business. The District Court, however, correctly held that it was *not* such a peril and that finding is conclusive. Plaintiff in error says that ''the lower court held *as a conclusion of law* that such tidal and cross currents were not a peril of the sea'' (Brief, p. 40), but this is not the case, for the finding in question (No. XI) was one of the ''Findings of Fact''. And no one was better qualified to find on this point than the judge presiding in the very locality in question.

The sole question in this case therefore is whether a sinking on a calm clear day, caused *solely* by over-

loading the vessel at an intermediate port, is a peril of the sea insured against in an ordinary marine policy.

PLAINTIFF'S CONTENTION THAT THE LAW OF ENGLAND GOVERNS THE CONSTRUCTION OF THE POLICY IN THIS CASE AS REGARDS THE IMPLIED WARRANTY OF SEAWORTHINESS.

We believe plaintiff is in error in stating that the law of England and America is the same on the subject of the implied warranty of seaworthiness. We also believe that, under American law, there is room for serious doubt as to whether this warranty did not exist when the "Rubaiyat" sailed from Tacoma as well as from Olympia, especially in view of the gross negligence of the master in permitting the vessel to sail in an unseaworthy condition from the latter place (see *4 Joyce on Insurance,* 2 ed. Secs. 2173, 2174; *Union Ins. Co. v. Smith,* 124 U. S. 405; 31 L. Ed. 497, 506). We would also point out that plaintiff has neither pleaded or proved English law, which, in the absence of such proof, is presumed to be like our own (*Liverpool, etc. Steam Co. v. Phoenix Ins. Co.,* 129 U. S. 397; 32 L. Ed. 788, at p. 793).

The defendant, however, does not desire to seek escape from its policy on any such technicality and, if the court should hold that the provision in the policy that the adjustment and settlement of claims shall be made "in conformity with the laws and customs of England" (Record, p. 12) makes English law applica-

ble on the question of *liability* under the policy, we are willing to have the court determine the English law from its own reading of the books. All that defendant desires is a fair and just determination of the case.

We shall proceed with our further argument on the theory that English law is applicable and discuss the case on that basis. Apart from the question of the warranty of seaworthiness, however, we believe the law of both countries to be the same as to all questions involved in the case and we therefore shall not confine ourselves to English decisions.

THE LAW APPLICABLE TO THIS CASE. IT IS NOT THE LAW THAT A SINKING ON A CALM CLEAR DAY CAUSED BY OVERLOADING IS A PERIL OF THE SEA.

Before discussing in detail the law applicable to this case, it will be well to clear up certain points repeatedly referred to in plaintiff's brief and relied on by it as establishing liability.

In the first place plaintiff contends that, as the "Rubaiyat" was seaworthy when she sailed from Olympia, the implied warranty of seaworthiness was complied with and there was no such warranty applicable on sailing from Tacoma. It then further contends that the fact that the officers of a vessel are negligent will not defeat recovery and it repeatedly refers to the well known maxim—*causa proxima non remota spectatur*. All these points can well be admitted. If there is no warranty of seaworthiness, the assured is not to

be prejudiced by actual unseaworthiness, nor is it to be prejudiced by the negligence of the vessel and, if the vessel sinks *by reason of encountering perils of the sea,* it is of no consequence that she might have withstood these perils if she had been seaworthy or not negligent. In *such* cases sea perils are the proximate cause of the loss and unseaworthiness and/or negligence the remote causes. But the assured must prove a loss *by perils insured against* and, if the vessel encounters *no sea perils* and is lost by the *ordinary* action of the winds and waves and currents, which are in no sense fortuitous, then the assured has not proved its case. And, if she is unseaworthy, so as to be unable to withstand *ordinary* conditions, then such unseaworthiness *is* the proximate cause of the loss. If this ground work of the law is understood the case becomes a very simple one.

Plaintiff makes the following astonishing statement in its brief (p. 13):

> "That the 'sinking' or 'foundering' of a vessel is a peril of the sea seems to us too plain to admit of argument."

It cites in support of this bald statement *Arnould on Marine Insurance,* Sec. 812. A reference, however, to the context of that section shows that such sinking is not, of itself, a peril of the seas, but must be *caused* by such a peril. This is made very clear by the following section, where the author says:

> "Foundering at sea, *when proximately caused by the fury of storms and tempests,* is an obvious case of loss by perils of the sea."
>
> *II Arnould,* (10 ed.) Sec. 813.

Plaintiff claims that the policy in this case is governed by English law (Brief, p. 10). In this connection, therefore, it is important to note that under Section 55 of the English Marine Insurance Act of 1906 an insurer is "not liable for any loss which is not proximately caused by a peril insured against." And it is still more important to note that, under Section 7 of the rules for construction of an English policy, it is provided that:

> "The term 'perils of the seas' refers only to fortuitous accidents and casualties of the seas. *It does not include the ordinary action of the winds and waves.*"
>
> *II Arnould,* (10 ed.) p. 1684 (Appendix A).

Arnould says that it is "essential" to bear this provision in mind in fixing the cause of the loss (Id. Sec. 776).

We wish to remark, in passing, that, if ever a boat sank as a result "of the ordinary action of the winds and waves," that boat was the "Rubaiyat." She simply encountered the usual, ordinary and "well-known" (Record, p. 36) currents prevailing in Tacoma harbor and affecting alike *every* vessel going out of that port, which currents, as the lower court found as a *fact,* were *not* perils of the sea.

In line with the above Arnould further remarks in Section 777:

> "The damage caused by springing a leak is not a charge upon the underwriters, unless it be directly traceable to some fortuitous occurrence as where the leak can be proved to have been caused by a heavy sea striking the vessel or by her being

> driven on a rock etc.; where the leak arises from the unseaworthy state of the ship when she sailed, or from wear and tear or natural decay, and is only a consequence of that ordinary amount of straining to which she would unavoidably be exposed in the general and average course of the voyage insured, the underwriter is not liable."

And in Section 825:

> "Where, however, the loss is not proximately caused by the agency of the winds and waves, but is merely the natural result of the contemplated action of sea-water on the subject of insurance, or of the ordinary wear and tear of the voyage, it is not recoverable as a peril of the seas, nor indeed under the policy at all."

And in Section 799, discussing cases *where there is no warranty of seaworthiness,* he says that:

> "Independently of the statute, and the decisions on which it was based, it is *always* open to the underwriter to show that the loss arose, not from any peril insured against, *but directly owing to the unseaworthy condition in which the vessel sailed.*"

That is exactly what was shown in the case at bar and what was found by the court (Finding No. XI, Record, p. 36). No sea perils were encountered and therefore the unseaworthiness of the vessel was the proximate and sole cause of the loss and not in any sense a remote cause.

Plaintiff in its brief cites the following from the case of *Wilson v. Xantho,* 12 A. C. 503 (also referred to with approval in *II Arnould,* Sec. 812):

> "I think it clear that the term perils of the sea does not cover every accident or casualty which

> may happen to the subject matter of the insurance on the sea. It must be a peril 'of' the sea. Again, it is well settled that it is not every loss or damage of which the sea is the immediate cause that is covered by these words. They do not protect, for example, against that natural and inevitable action of the winds and waves which results in what may be described as wear and tear. There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure. The purpose of the policy is to secure an indemnity against accidents which may happen *not against events which must happen.*"

In the case at bar the capsizing of the "Rubaiyat" could readily have been foreseen and was an event which was *bound to happen* because of her extreme unseaworthy condition when she sailed from Tacoma. Nothing could demonstrate the truth of this statement more forcibly than the fact that the vessel did, *fourteen minutes after sailing* (Record, p. 36), capsize and sink on a calm, clear day and solely as a result of her "top-heavy, unstable, tender and unfit condition" (Id.) and without the intervention of any but the most ordinary sea conditions. She was bound to sink when she started and she did sink.

The most that plaintiff could contend, in this connection, is that foundering at sea is *presumptive* evidence of a loss by perils of the sea, as is well pointed out by this court in *Aetna Insurance Company v. Sacramento Stockton S. S. Co.,* 273 Fed. 55, referred to in plaintiff's brief. The "Rubaiyat," however, did not even founder "at sea." She foundered in Tacoma harbor under conditions which would raise a presumption that

the loss was due to unseaworthiness, happening, as it did, only a few minutes after sailing.

See

The Southwark, 191 U. S. 1; 48 L. Ed. 65, 71;
Steamship Wellesley Co. v. Hooper, 185 Fed. 733, 736-7;
The Arctic Bird, 109 Fed. 167;
Pacific Coast S. S. Co. v. Bancroft-Whitney Co., 94 Fed. 180;
The Gulnare, 42 Fed. 861;
Walsh v. Insurance Co., 32 N. Y. 436.

Two of the above cases were decided by this court.

Passing by the above inquiry, however, as to whose duty it is to establish the *cause* of the sinking, it is certain that such cause must be established by either plaintiff or defendant and that no liability rests upon defendant, unless the cause, when established, is found to be a "peril of the sea." The court's remark in its ruling on the demurrer that "Here the cause is known" (Record, p. 23) applies equally to the conclusion of the trial, for the court found *as a fact* that the cause was unseaworthiness and *not* perils of the sea. And, as heretofore pointed out, that finding is unassailable on appeal.

Under a fire insurance policy, an assured would hardly contend that a destruction of a house by a gale was covered and so, in a marine policy, a sinking by reason of "the ordinary action of the winds and waves" is not a loss by "perils of the sea" and by the British Marine Insurance Act is expressly defined as not being

such a loss. If the policy were against "all risks" plaintiff might be able to recover, but to allow it to recover in this case would be to delete the terms of the policy as to specified *marine* perils and to construe it as covering *all* perils. Such is not a fair construction of a *specified* kind of insurance, for which plaintiff paid a much smaller premium than it would have for an "all risk" policy, if, indeed, such a policy could have been secured at all. In this connection, we note plaintiff's casual references to the fact (apparently not seriously relied on) that the policy also covers "all other perils, losses and misfortunes that have or shall come etc." This language of course "includes only perils *similar in kind* to the perils specifically mentioned in the policy"—perils which are *ejusdem generis* with those insured (*II Arnould,* 10 ed., Sec. 860; *38 Corpus Juris,* 1109). In *Sassoon & Co. v. Western Assurance Co.,* XII Asp. Mar. Cases 206, where, as in the case at bar, the damage to the cargo was solely due to the unseaworthiness of the vessel, the court said:

> "The risks covered by the policy were the risks usually described in such a contract—namely 'perils of the sea and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said * * * goods.' *It was not contended on the plaintiff's behalf (nor could it have been) that these words covered any risk except the risk of damage by perils of the seas;* but it was said that the loss was due to such a peril."

Judge Neterer held on the demurrer in this case that the clause in question was inapplicable (Record, p. 26) and also found *as a fact* that the loss was not within it

(Id. p. 36). It certainly is not an "all risk" clause and, as it is only mentioned incidentally by plaintiff, we shall not discuss it further. It obviously does not cover accidents happening by "the ordinary action of the winds and waves," which are excluded as causes of a loss under English law.

We feel that we could well rest our case on the foregoing general principles, but we think it wise to refer the court to a few specific authorities supporting them and to clearly distinguish the cases cited by plaintiff.

Especially in point, of course, are cases where there was, as in the case at bar, no warranty of seaworthiness. One of such cases is that of *Sassoon & Co. v. Western Assurance Co.*, XII Asp. Mar. Cases 206, which has just been cited. In that case the vessel sprang a leak, due to the rotten condition of her hulk (which was not known to plaintiffs, as it was covered by copper sheathing) and sea water entered the vessel and damaged plaintiffs' cargo. The policy was a *time* policy, in which, as plaintiffs' counsel clearly pointed out (see p. 207), there was no warranty of seaworthiness. Nevertheless the court said:

> "There was no weather, nor any other fortuitous circumstances, contributing to the incursion of the water; the water merely gravitated by its own weight through the opening in the decayed wood and so damaged the opium. It would be an abuse of language to describe this as a loss due to perils of the sea. Although sea water damaged the goods, no peril of the sea contributed either proximately or remotely to the loss. There is ample authority for so holding, but it is sufficient to cite the judgment of Lord Herschell in The Xantho (sup.),

where he says: 'I think it clear that the term "perils of the sea" does not cover every accident or casualty which may happen to the subject matter of the insurance on the sea. It must be a peril "of" the sea. Again it is well settled that it is not every loss or damage of which the sea is the immediate cause that is covered by these words. They do not protect, for example, against that natural and inevitable action of the winds and waves which results in what may be described as wear and tear.'

"An attempt was made during the argument to attribute a different meaning to the expression 'perils of the sea' when used in a policy on goods from that which it bears when used in a policy on ship; but no authority was cited for the distinction, nor would it be right in principle to make any such distinction. In the case above cited an attempt was made to draw a distinction between the meaning to be given to the words when used in a bill of lading and in a policy of insurance, but Lord Herschell said, 'It would, in my opinion, be very objectionable unless well settled authority compelled it to give a different meaning to the same words occurring in two maritime instruments.'

"In this case the damage though doubtless proximately due to sea water, was not in any sense due to sea peril. It does not therefore fall within the policy."

This case also disposes of plaintiff's argument (Brief, pp. 37-38) that a shipper of cargo stands in any different position from the shipowner himself.

In *Fawcus v. Sarsfield,* 6 E. & B. 192; 119 Eng. Rep. 836, the court expressly held there was no warranty of seaworthiness. In that case the vessel, before meeting any unusual weather, was damaged and obliged to put back for repairs. On resuming the voyage she was

dashed against a rock and sunk. The owners sued for the cost of the repairs and also for the loss of the ship and were held entitled to recover for the latter, but not for the former. The court said in part (p. 840):

> "Upon the whole, it seems to me that in this case the underwriters cannot set up any implied warranty of seaworthiness, and that they are liable for the final loss of the ship, which is allowed to have arisen by the perils of the sea insured against.
>
> "But a different question arises respecting their liability for the expense occasioned by reason of her putting into a port to be repaired, the loss to which the fourth plea is pleaded. The arbitrator has found that the facts alleged in that plea are true, although without the knowledge of the assured. What are these facts? That, when the ship sailed from Liverpool, she was in an unseaworthy and unsound state and condition, and so continued till after this loss accrued; that she was not reasonably fit to encounter, and bear the ordinary force of the winds and waves; that, during this time, she did not encounter any more severe weather than is usual and ordinary on such a voyage or than a ship reasonably fit for the voyage could have encountered without damage or injury: and that the necessity for her going into port to be repaired arose from the defective state of the ship when she sailed.
>
> "Although she was not seaworthy when she sailed, it must be taken, according to my view of the case, that the policy attached; but, unless this loss arose from perils insured against, it cannot be cast upon the underwriters. Now the arbitrator appears to find most explicitly that it did not arise from any peril insured against, but from the vice of the subject of insurance."

This case is referred to with approval in *Dudgeon v. Pembroke,* II Asp. Mar. Cases 323, 331.

The above cases are cited first because they are English cases and plaintiff claims that English law governs the case at bar. Far more in point than either of them, however, is a recent American case which follows their doctrines—*New Orleans T. & M. Ry. Co. v. Union Marine Insurance Company Ltd.* (the same defendant as in the case at bar), 286 Fed. 32, decided by the Circuit Court of Appeals for the Fifth Circuit in 1923. In that case a barge sank at her dock in calm weather, due to her unseaworthy condition, resulting in the loss of most of her cargo. The cargo owner sued the present defendant under a policy precisely similar to the one in the case at bar. There was a question as to whether there was an implied warranty of seaworthiness, but it will be noted that the court decided the case on the assumption that there was no such warranty. The court said (pp. 34-35):

> "But, whether these policies contained such an implied warranty or not, we do not think that the loss covered in this case is within the perils insured against by them.
>
> "An insurance policy only insures against the perils named in the contract of insurance. *Fawcus v. Sarsfield,* 6 El. & Bl. 192, 204.
>
> "Here the evidence showed that no peril of the river, but the unseaworthiness of the barge, caused the loss. Unquestionably the barge sank from water entering through open seams. The evidence preponderates in favor of the finding of the District Court that the seams above the water line had been opened by the hot sun, and the oakum therein was loose or had fallen out entirely, thus causing her to fill with water when in the course of loading these seams were forced below the water line, and

that the loss occurred by reason of this unseaworthy condition.

"An unseaworthy condition of the vessel at the time the insurance attaches is not a peril of the sea (river), and under a policy where there is no warranty of seaworthiness, express or implied, a loss of vessel or cargo, by reason of such unseaworthiness is not covered by such policy. *Arnould on Marine Insurance,* §799; *Fawcus v. Sarsfield,* 6 El. & Bl. 192, 204; *Sassoon & Co. v. Western Ass. Co.,* (1912) A. C. 561, 563."

It seems to us that this case conclusively disposes of plaintiff's contention that a sinking, in and of itself, is a peril insured against.

Another case strongly in point is that of *Gulf Transportation Co. v. Fireman's Fund Ins. Co.,* 83 Southern 730, where a barge was insured under a policy practically identical with that in the case at bar. The barge broke down *about thirty minutes after starting on her voyage under the weight of her own cargo,* without encountering any unusual weather conditions. She had previously been fully repaired *by the insurer* and, for this reason, the court decided the case on the assumption that there was no warranty of seaworthiness. The court says in part (at p. 733):

"But, if it be granted that appellee admitted the seaworthiness of the vessel at the commencement of the voyage down Houston Ship Channel, it does not follow that appellant is thereby entitled to recover under the policy. The loss complained of must be one within the terms of the policy. Certainly if the vessel broke under the weight of her own cargo, without encountering any perils of the sea, there can be no recovery. The testimony in the case justifies such a conclusion of the chancellor;

and, so, any presumptions or conjectures must yield to the proof. It is not a case where a vessel sinks without any known cause. Competent surveyors have examined the barge since the last mishap and give their testimony as experts on the real efficient cause of the accident. Under this view, it is unnecessary to indulge in any presumptions in favor of seaworthiness, or as to the burden of proof on this point. Aside from the usual presumptions so much discussed in the briefs, there was no extraordinary circumstance of weather, wind, rocks, sand, or any other fortuitous event which contributed in whole or in part to the loss complained of. It is not a case of stranding, and therefore a loss under the policy.

"Counsel for appellant cite *Arnould on Marine Insurance* (9th E.) par. 694, to the point that, if the ship starts seaworthy, the underwriters are precluded of any defense based upon any alleged unseaworthy condition. The author is there discussing cases in which the underwriters on the face of the policy 'allowed the vessel to be seaworthy for the voyage,' and the effect of such a provision on a loss 'caused remotely by the ship having become unseaworthy, but proximately by a peril insured against.' Counsel have cited no case which does not require the loss to be 'proximately caused' by one of the perils insured against. Surely the contract must govern the rights and obligations of the parties, and, as stated by counsel for appellee, 'an insurance policy is not a promissory note.' It is certainly not our purpose to define the term 'perils of the sea' or to indicate all the losses comprehended by a policy of marine insurance. Our duty in the case at bar is to determine whether the misfortune is an extraordinary or fortuitous accident against which indemnity is given, or an ordinary event which is not contemplated by the policy."

It is submitted that the above reasoning completely refutes practically all of plaintiff's contentions in the

case at bar. In that case, as in this, the vessel collapsed "under the weight of her own cargo."

All of the above cases are especially in point in that they were decided on the basis of no warranty of seaworthiness being involved, the absence of which is plaintiff's chief reliance in this case. There are, however, many other cases worth citing on the general principles involved, of which we shall refer to only a few.

In *Anderson v. Greenwich Ins. Co.,* 79 Fed. 125, a barge loaded with lumber, while being towed in a narrow channel-way from West Duluth, rolled so as to dump her deck cargo. In dismissing the libel (alleging that the loss was caused by sea perils) Judge Brown said:

> "Under circumstances like the present, in a clear day, in moderate weather, in a quiet stream, the fact that a boat is so loaded as to dump a considerable portion of her deck load, is of itself persuasive evidence that the accident was because the vessel was topheavy, in the absence of any clear proof that her navigation was such as would naturally be expected to cause a properly loaded boat to dump her cargo. 'Res ipsa loquitur.' It is not enough to say that if the boat had been towed very slowly, and with extreme care, and had never touched bottom, she might have escaped dumping. She was loaded for a trip to Tonawanda, a distance of several hundred miles. Her loading was bound to be such as would be safe in all ordinary changes of weather, *and with all the ordinary incidents of navigation,* conducted in the ordinary manner. I am persuaded that this boat was not so loaded. See *Sumner v. Caswell,* 20 Fed. 253."

The case is extremely interesting in that the vessel in question was so loaded as to be "topheavy" just as was the "Rubaiyat" in the case at bar.

Another very similar case is that of *Cary v. Home Insurance Co.,* 1923 Am. Maritime Cases 439, where an improperly loaded scow capsized at her dock. In holding that the loss was not due to perils insured against, the court said:

> "The question is: 'Did the scow encounter a disaster which disabled and rendered her unseaworthy or was her unseaworthiness the cause of her disaster?' It appears that the scow after a short voyage in moderate weather, when moored in calm water, listed and turned over; that the cause was (a) leakiness whereby the water entered the hold, (b) want of ordinary care in placing a portion of the cargo preparatory to unloading another portion of it, which caused the cargo to roll when the ship had listed sufficiently to put it in motion. As the scow lay at the dock, she was unfit to encounter the ordinary danger of turning over. Her unfitness made her list and made her cargo shift. No other explanation suggests itself. She was a leaky scow with a cargo improperly stowed. In short she was unseaworthy, and her own defects, not the perils or dangers of the sea, were responsible for her misfortune."

See also:

Mannheim Ins. Co. v. Clark, 157 S. W. 291, at pp. 297, 298;

The S. S. Keokuk v. Home Ins. Co., 9 Wall. 526, 19 L. Ed. 746 at p. 747 (last paragraph);

Merchants Trading Co. v. Universal Marine Co., Not reported, but cited with approval in *Dudgeon v. Pembroke,* II Asp. Mar. Cases at pp. 331-332;

Ballantyne v. Mackinnon, VIII Id. 173.

We respectfully submit that the above authorities plainly show (1) that a plaintiff must show perils of the sea to recover under a marine policy, (2) that a sinking alone is not such a peril, especially where, as here, the cause of the sinking is known and specifically found by the court (which finding has the effect of a verdict of the jury) and (3) that a loss due to unseaworthiness alone is not recoverable, even when there is no warranty of seaworthiness.

Applying these principles to the case at bar and the findings of the trial court as to the cause of the loss, it is apparent that plaintiff cannot recover in this suit.

We now turn to the cases cited by plaintiff, which, when critically examined, will be found to reinforce our position.

CASES CITED BY PLAINTIFF IN ERROR.

Plaintiff has cited a large number of cases in its brief, most of which, in our opinion, are obviously inapplicable. We shall not attempt to deal with all of the cases so cited, but will briefly distinguish those principally relied on.

Plaintiff draws broad conclusions from the case of *Aetna Insurance Company v. Sacramento Stockton Steamship Company,* 273 Fed. 55, decided by this court, which are not warranted by the record. In that case one of the insurer's own witnesses testified that the vessel was in a "bad storm," which, the court held, caused her loss. It was only in view of *this* evidence that it held that it was not error to reject testimony as

to unseaworthiness. It did *not* hold, as stated by plaintiff, that the "foundering" was the proximate cause of the loss, but that "perils of the sea" caused the foundering. It further said that, under English law and practice, "*severe* storms, *rough* seas and even fogs may be comprised in perils of the seas." If *foundering alone* were a peril of the sea the court was wasting its time in writing the elaborate opinion which it did and the decision is wholly inconsistent with any such theory. We are glad to unreservedly accept the tests of perils of the sea laid down in that case and we also unreservedly assert that the case at bar cannot be brought within those tests.

In the case of *Dixon v. Sadler,* 5 M. & W. 405; 151 Eng. Rep. 172 (to which plaintiff devotes six pages of its brief) the vessel capsized as a result of "a strong squall" coming on her from the southeast (151 Eng. Rep. at p. 173). The defendant *admitted* in his answer that the loss was caused "by perils of the sea" (Id. p. 172), but alleged that, by reason of her unseaworthy condition, and the negligence of her crew, she was unable to withstand such perils, which, if seaworthy, she could have withstood. As there was no warranty of seaworthiness, the plea was obviously bad and perils of the sea were the proximate cause of the loss and unseaworthiness and negligence only the remote causes. The exact contrary is true in the case at bar.

The next case cited is *Dudgeon v. Pembroke,* 3 Asp. Mar. Cases 393 (to which over four pages are devoted). All that this case holds is that, where there is no warranty of seaworthiness, a loss *caused by perils of the*

sea is recoverable under the policy, even though the vessel could have withstood such perils if seaworthy—the same holding as in *Dixon v. Sadler,* supra. An earlier report of the case shows that a gale of wind or at least a very heavy one was blowing, that "a heavy rolling sea was running and it became necessary to put a sail over the stokehold to prevent the sea from getting in," that the vessel labored heavily making much water and was finally shipwrecked (III Asp. Mar. Cases at pp. 102-103). In other words there was a loss *by perils of the sea* and here again unseaworthiness was only the remote cause of the loss. In the case at bar it was the *direct* cause.

All of the above three cases were the subject of careful and most elaborate opinions and hold no more than we have already conceded in this brief. If, as contended by plaintiff, the mere capsizing of a vessel is, in and of itself, a peril of the sea, why did none of these courts discover this very simple solution of the problem, which would have saved all their labors. The answer is self-evident. *Capsizing alone is not a peril of the sea* and, to recover for capsizing, perils of the sea must be *proved.* There is no other basis on which the decisions in these three very well reasoned cases can be explained. None of them warrant a recovery for a sinking or capsizing in calm water and under ordinary and usual conditions.

None of the other cases cited demand extended comment. In *Walker v. Maitland,* 106 Eng. Rep. 1155, a vessel was stranded through the negligence of her crew and was beaten to pieces by the "violence of the winds

and waves." In *Trinder, Anderson & Co. v. T. & M. Ins. Co.,* 8 Asp. Mar. Cases 273, a negligent stranding was also involved, after which the vessel beat heavily on the reef and the seas washed over her, so that the freight on the cargo became a total loss. In *Redman v. Wilson,* 12 M. & W. 476, a vessel broke loose in a tornado and began to leak and finally was run ashore to prevent her sinking and became a total loss. The loss was clearly due to perils of the seas and the negligent loading, referred to by plaintiff, was therefore merely a remote cause of the loss, just as the negligence in the two previous cases was also remote. *American Hawaiian S. S. Co. v. Bennett,* 207 Fed. 510, was also a stranding case where a lighter in tow of another vessel struck the bank of a creek and became a total loss.

All of the above four cases are *stranding* cases, in which the strandings and subsequent loss of the vessels involved were held to be perils of the sea. In this respect they resemble losses by collision, which also is a loss by perils insured against. Both involve striking some ship or other obstacle and both are, under the terms of the English Marine Insurance Act, "fortuitous accidents and casualties of the sea," which are *not* caused by "the ordinary action of the winds and waves." The latter losses are excluded by the policy.

The case of *Wilson v. Xantho,* 12 A. C. 503, is a collision case and no one now doubts that a loss by collision is one by perils insured against and is "fortuitous" just as is a stranding. None of these cases are in point in the case at bar.

In the case of *Orient Insurance Company v. Adams,* 123 U. S. 67, a vessel was negligently unmoored by her master and, having no steam up, drifted over the falls of the Ohio River. Drifting over the falls was unquestionably a peril insured against and here again the negligence of the master was the remote and not the proximate cause of the loss. If the "Rubaiyat" had drifted over any falls this case would not be in court and the policy would have been paid. If the vessel in the *Adams* case had sunk in the ordinary currents of the Ohio River and the court had held this a peril of the river, the case would be in point, but there is no such holding in that case or in any other of which we are aware.

As for the case of *Crescent Ins. Co. v. Vicksburg etc. Co.,* 69 Miss. 208; 13 So. 254, where it was held that the damage to cotton bales by the careening of a vessel (due to negligent unloading) was "a peril of the river," because the damage was caused by "water of the river," we have only to say that we do not agree with its conclusions and we think that in *that* case the negligence of the crew was the proximate cause of the loss. The court makes a clear misapplication of the case of *Redman v. Wilson,* supra, in reaching its conclusion. The case is squarely opposed to the cases of *New Orleans v. Union Marine Ins. Co.,* 286 Fed. 32; *Anderson v. Greenwich Insurance Co.,* 79 Fed. 125 and *Cary v. Home Ins. Co.,* 1923 Am. Mar. Cases 439, heretofore cited by us.

Plaintiff's cases (except for the one last mentioned) establish only the elementary proposition that, when a

vessel or cargo is lost or damaged *by sea perils,* the fact that the vessel was unseaworthy (if there is no warranty of seaworthiness) or her crew were negligent is no defense under the policy, such unseaworthiness and negligence being considered, under well settled marine insurance law, to be only the remote causes of the loss or damage. But, to bring this principle into play, *there must be a loss by sea perils* and, if a vessel is lost by reason of unseaworthiness or negligence *without sea perils,* then such unseaworthiness or negligence becomes the *proximate* cause of the loss and not the remote cause. And, as already pointed out, plaintiff's own cases abundantly establish that capsizing or sinking, taken by itself, is not a sea peril.

We cannot do better in closing this discussion of the law than by citing the following apt language of the Supreme Court in *Hazard v. New England Marine Ins. Co.,* 8 Peters 557, 585:

> "In an enlarged sense all losses which occur from maritime adventures may be said to arise from perils of the sea; but the underwriters are not bound to that extent. They insure against losses from extraordinary occurrences only, such as stress of weather, winds and waves, lightning, tempest, rocks, etc. These are understood to be the perils of the sea referred to in the policy, *and not those ordinary perils which every vessel must encounter.*"

The alleged "current," which, plaintiff contends, caused the loss was clearly one of "those ordinary perils which every vessel must encounter," and which vessels sailing in and out of Tacoma harbor encounter

every day. As said by Captain Ryan "there is *always* that current there" (Record, p. 56). To call it a "peril of the seas" would be, in our opinion, both a travesty and a tragedy.

SUMMARY OF POINTS INVOLVED IN THIS CASE.

Summing up the various points involved in this case we find:

1. That the District Court's findings of fact are conclusive and are unassailable on appeal and that therefore the only question before the court is whether they support the judgment.

2. That hence plaintiff's discussion of the evidence in this case and especially the exaggerated evidence in regard to the currents is immaterial and extraneous to the issues made by the appeal.

3. That the findings of the District Court amply support the judgment, especially its findings that the "well known" currents in Tacoma harbor are not "perils of the seas, or any other perils or risks covered by the contract of insurance" and that the sole cause of the loss was the "topheavy, unstable, tender and unfit condition" of the vessel.

4. That the cases cited, both by plaintiff and defendant, conclusively establish that a sinking alone is not a peril insured against in an ordinary marine policy such as that in the case at bar.

5. That a loss solely due to unseaworthiness (as the trial court found plaintiff's loss to be) is not recover-

able, even though there be no warranty of seaworthiness attached to the policy.

CONCLUSION.

Plaintiff claims that, if the judgment in this case is reversed, judgment should be entered in its favor. Plaintiff here, as in other parts of its brief, proceeds on the assumption that this is an admiralty case and, of course, all it can possibly ask for is a new trial. We confidently submit, however, that the judgment is in all respects correct and in accordance with well settled principles of marine insurance law and that it should therefore be affirmed.

Respectfully submitted,

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Dated, San Francisco,
October 28th, 1925.

In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 4679

OLYMPIA CANNING COMPANY, a corporation,
Plaintiff in Error.

vs.

THE UNION MARINE INSURANCE COMPANY, LTD., a corporation,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Reply Brief for Plaintiff in Error

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FILED
NOV 16 1925

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I.

It is first contended in the brief of the defendant in error that the trial court found, as a fact, that the foundering of the vessel involved in this case was not caused by a peril of the sea, and that this finding is conclusive on this court under Section

649, United States Revised Statutes. Whether a given state of facts constitutes a peril of the sea or other peril within the terms of a policy of insurance is obviously a question of law and not of fact. The court in this case found that the vessel was seaworthy, properly loaded, and had competent officers and crew, at the time she started on her voyage from Olympia, at which time the policy attached; that upon arrival at Tacoma, an intermediate port, the master took on additional cargo so that she was then so heavily loaded "that at her port she had only about six inches freeboard, which was the maximum she could be put down with safety"; that she backed out from her dock in the waterway at Tacoma without any indication of tenderness or topheaviness, although subjected to the displacement waves of a passing vessel, and proceeded a distance of about two and one-half miles, when she encountered certain tide rips and cross currents, changing her course at the same time; that she capsized before getting out of these tide rips and cross currents; that the "listing, capsizing and sinking of the vessel was caused by her being so topheavy, unstable, tender and unfit condition, due to the improper manner in which the cargo taken on at Tacoma was stowed aboard her, as to

be unable to withstand the effect of said tidal or cross currents, and was not caused by perils of the seas or any other perils or risks covered by the contract."

It is manifest that the last statement, to the effect that the foundering of the ship was not caused by perils of the sea, is a conclusion, and not a finding of fact within the meaning of the statute referred to. The sole question involved in the *Sassoon* case, cited by defendant in error, and in *Dixon v. Sadler* and other cases cited in our original brief, was whether the ascertained facts causing the loss constituted, in law, perils of the sea within the meaning of the policy. Construction of a contract is always a question of law for the court. It seems to us too plain for argument that it is for this Court to determine, as a matter of law, whether the facts found to exist by the trial judge, as stated in his findings of fact, constitute in law such a peril as falls within the policy.

Such was the express holding of Lord Penzance in *Dudgeon v. Pembroke*, cited by this court in *Aetna Insurance Co. v. Sacramento & Stockton S. S. Co.*, 273 Fed. at page 60.

II.

The defendant in error also questions our contention that the construction of the policy in this case, as regards implied warranty of seaworthiness, is to be governed by the law and practice of England. The language of the policy in that respect is, we believe, identical with that used in the policy involved in the case of *Aetna Insurance Co. v. Sacramento & Stockton S. S. Co.*, 273 Fed. 55, wherein this Court proceeded to determine liability under the policy in accordance with its understanding of the laws of England. It is true that in the instant case the laws of England are not pleaded. But, while that fact is mentioned by the defendant in error in its brief, we understand that it is not insisted upon. On the contrary, the brief states:

"The defendant, however, does not desire to seek escape from its policy on any such technicality; and if the court should hold that the provision in the policy that the adjustment and settlement of claims shall be made 'in conformity with the laws and customs of England' makes English law applicable on the question of liability under the policy, we are willing to have the court determine the English law from its own reading of the books."

If, however, the Court should think there is any doubt about the provision in the policy making the question of implied warranty thereunder one to be governed by the English law, then it would follow that the law of the State of Washington, where the policy was issued, would govern. Section 7175 of Remington's Compiled Statutes of Washington provides: "An implied warranty of seaworthiness is complied with if the ship be seaworthy at the time of the commencement of the risk," except in time policies when the ship must be seaworthy at the commencement of each voyage thereunder, and except in insurance on cargo which is intended to be transhipped at an intermediate port, in which case each vessel upon which the cargo is shipped or transhipped must be seaworthy at the commencement of its particular voyage.

III.

Defendant strenuously contends that the facts found by the court below to have caused the sinking of the vessel, and the consequent loss of the assured's cargo, do not constitute a peril of the sea or other peril covered by the policy; and that of course is the one question involved in the case.

It may be that when a vessel founders solely as the result of the decayed and rotten condition she was in at the time the policy attached, without any stress of weather or mismanagement or errors in navigation, or other external agency or force affecting her condition after the voyage commenced, the sinking would not be regarded as the result of a peril of the sea; but we contend that where a vessel is seaworthy, properly manned and equipped, at the time she commences her voyage and when the policy attaches, and some unexpected and unforeseen event occurs thereafter during the course of the voyage, which changed her condition, and which event in conjunction with the action of the sea, whether calm or tempestuous, causes the vessel to founder, the loss is attributable to a peril of the sea within the meaning of the insurance policies. There is nothing in *Sassoon & Co. v. Western Insurance Co.*, 12 Asp. Mar. Cas. 206, cited by defendant in error, which holds to the contrary. In that case, at the time the policy attached the vessel was lying in port in a decayed and rotten condition, and in the course of a short time, without any accident of any kind and without any change in her condition by reasons other than ordinary wear and tear, water entered her hold through leaks in rotten planks and destroyed the cargo.

Without attempting any general or all-inclusive definition of the phrase, "perils of the sea," it is clear that it includes the co-existence as operating forces or causes of two essential conditions. First, it must be a marine loss—the damage must directly from the sea. This condition is admittedly present in this case. The plaintiff's goods were lost by coming in contact with the water when cast into the sea. The water destroyed them. It was a marine loss—a loss by the sea. The second essential to a loss by a "peril of the sea," within the settled construction of that phrase is the presence in some form of the element of chance or the unexpected, commonly called "fortuitous" or "accidental"; and this element must be something occurring after the policy attached, and something that contributed to the loss. This second essential may be supplied by storms or tempestuous seas, or by hidden and unknown rocks or shallows. It may also consist of or result from the management or navigation of the vessel, including the trim of the ship or stowage of cargo at intermediate ports, after the policy attached. The question in this case is whether there was present this second essential—the "fortuitous" or "accidental" element—as a contributing factor to the loss.

In the *Sassoon* case, this element was lacking. The loss was the direct result of sea water entering the vessel and coming in contact with the insured goods, and was, therefore, a marine loss; but the intrusion of the water was the natural and certain result of the decayed condition of the vessel when the policy attached. Nothing occurred after the policy attached to change the condition of the vessel or bring about the loss except natural and inevitable wear and tear by the lapse of time. The essential element of chance or fortuity was absent; and therefore the loss was not within the policy.

The distinction we are seeking to emphasize is well stated by Lord Herschell in *Wilson v. Xantho*, 12 A. C. 503, as follows:

"There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure. *The purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen.* It was contended that those losses only were losses by perils of the sea which were occasioned by extraordinary violence of the winds or waves. I think this is too narrow a construction of the words, and it is certainly not supported by the authorities or by the common understanding. It is beyond question that if a vessel strikes upon a sunken rock in fair weather and sinks, this is a loss by perils

of the sea. And a loss by foundering owing to a vessel coming into collision with another vessel, even when the collision results from the negligence of that other vessel, falls within the same category."

In the above case, the House of Lords was dealing with a loss from foundering caused by collision attributable solely to negligent navigation and without any extraordinary violence of the winds or waves. In a previous case decided by the Queens Bench (*Woodley v. Mitchell*, 11 Q. B. D. 47), it had been held that a loss caused by collision attributable solely to negligent navigation of one or both vessels was not a loss by perils of the sea within the terms of that exception in a bill of lading. In overruling the Woodley case, the House of Lords in the *Xantho* case, clearly establishes the doctrine in the English courts that a loss within the term "peril of the sea" as used in the bill of lading need not necessarily be caused by any violence of the winds or waves, but may be caused by the intervention of human agencies such as the negligence of the vessel's crew. In that case, the principle is also clearly established that any accident or fortuitous circumstance occurring subsequent to the inception of the voyage and which was not an ordinary incident of such voyage whereby the ship or cargo is damaged by sea water is a loss

by peril of the sea. We have cited fully from this case on pages 27-30 of our opening brief. This principle has since been followed in all of the English cases.

In *Davidson v. Burnand*, L. R. 4 C. P. 117, the crew negligently left open sea cocks or valves through which water entered the ship and caused the loss. The loss was attributable solely to the negligent action of the master and crew in managing the vessel. When the sea cocks were negligently left open, at a time when their opening was below the water line, the sea water normally and naturally entered the hold of the ship. The only thing that could be regarded there as fortuitous and unexpected or accidental was the negligent action of the crew in leaving the sea cocks open. Neither storms, winds nor waves were contributing factors.

In a suit against the underwriters, the Court, by Brett, J., stated:

"* * * the water got in not by the happening of any ordinary occurrence in the ordinary course of a voyage, but by the accidental circumstance of some cock having been left open by the negligence of the crew. That is, in my opinion, sufficient to make the underwriter liable. The question is the same as it would have been if by the falling of a

mast through the vessel, or other negligent act of the crew, the vessel had sunk in deep water, and I think the loss sufficiently comes within the doctrine of one happening by a *vis major*, and is within the meaning of the policy a loss caused by the perils insured against."

In the case of *Frazer v. Pandorf*, decided by the House of Lords and reported in Vol. 12 App. Cas. 518, it appears that sea water entered a seaworthy ship solely by reason of a hole gnawed into one of the pipes by rats, and in holding that the loss was within the term "peril of the sea," Lord Halsbury, Lord Chancellor, states in his decision:

"My Lords, in this case the admissions made at the trial reduce the question to this: whether in a seaworthy ship the gnawing by rats of some part of the ship so as to cause sea water to come in and cause damage is a danger and accident of the sea. * * * One of the dangers which both parties to the contract would have in their mind would I think be the possibility of the water from the sea getting into the vessel, upon which the vessel was to sail in accomplishing her voyage; it would not necessarily be by storm, the parties had not so limited the language of the contract. It might be by striking on a rock or by excessive heat so as to open some of the upper timbers. These and many more contingencies that might be suggested would let the sea in, but what the parties I think contemplated was that any acci-

dent (not wear and tear or natural decay) should do damage by letting the sea into the vessel, that that should be one of the things contemplated by the contract. A subtle analysis of all the events which led up to and in that sense caused a thing may doubtless remove the first link in the chain so far that neither the law nor the ordinary business of mankind can permit it to be treated as a cause affecting the legal rights of the parties to a suit. * * * Now cases have been brought to your Lordships' attention in which the decision has turned, not, I think, upon the question of whether it was a *sea* peril or accident, but whether it was an accident at all. I think the idea of something fortuitous and unexpected is involved in both words, 'peril' or 'accident'; you could not speak of the danger of a ship's decay; you would know that it must decay, and the destruction of the ship's bottom by vermin is assumed to be one of the natural and certain effects of an unprotected wooden vessel sailing through certain seas.

One ought, if it is possible, to give effect to all the words that the parties have used to express what this bargain is, and I think in this case it was a danger, accident, or peril in the contemplation of both parties, that the sea might get in and spoil the rice. I cannot think it was less such a peril or accident because the hole through which the sea came was made by vermin from within the vessel, and not by a sword-fish from without,—the sea water did get in."

And in the same case, Lord Bramwell states:

"What is the 'peril'? It is that the ship or goods will be lost or damaged; but it must be 'of the sea.' * * * In the present case the sea has damaged the goods. That it might do so was a peril that the ship encountered. It is true that rats made the hole through which the water got in, and if the question were whether rats making a hole was a peril of the sea, I should say certainly not. If we could suppose that no water got in, but that the assured sued the underwriter for the damage done to the pipe, I should say clearly that he could not recover. But I should equally say that the underwriters on goods would be liable for the damage shown in this case. * * *

An attempt was made to show that a peril of the sea meant a peril of what I feel inclined to call the sea's behavior or ill-condition. But that is met by the argument, that if so, striking on a sunken rock on a calm day, or against an iceberg, and consequent foundering, is not a peril of the sea or its consequence."

And Lord Herschell, in the same case, stated:

"Taking the facts of this case to be as I have stated them, I entertain no doubt that the loss was one which would in this country be recoverable under a marine policy, as due to a peril of the sea. It arose directly from the action of the sea. *It was not due to wear and tear, nor to the operation of any cause ordinarily incidental to the voyage and therefore to be anticipated.*" (Italics ours).

In the recent case of *P. Samuel & Co. v. Dumas*, decided by the House of Lords in February, 1924, and reported in 29 English Commercial Cases p. 238, the court was dealing with the case of a Greek ship that had been grossly over-insured and scuttled upon the direct orders of the owners for the purpose of collecting the insurance. The majority of the court, by Viscount Cave and Viscount Finlay, held that the deliberate scuttling of the ship was the proximate cause of the loss and not a peril of the sea, the decision being based upon the grounds; first, that Section 5 (2) of the English Marine Insurance Act which provides,—

"The insurer is not liable for any loss attributable to the wilful misconduct of the assured"

would bar a recovery; and, second, that the scuttling of the ship, having been due to the wilful misconduct of the assured, there was no accident or fortuitous element involved.

"Then, was the loss a loss by peril of the seas? Surely not. The term 'peril of the seas' is defined in the First Schedule to the Act as referring only to 'fortuitous accidents or casualties of the seas.' The word 'accident' may be ambiguous * * * but the word 'fortuitous' which is at least as old as Thompson v. Hopper, involves an element of chance or ill luck which is absent where those in charge of a vessel deliberately throw her away."

And Viscount Finlay states:

"The loss was directly due to the wilful and deliberate act of the owner, and there was nothing of the accidental element which is essential to constitute a peril of the sea."

Lord Sumner, in a lengthy opinion, holds that the scuttling of the ship by the wilful act of the crew in compliance with the owner's orders, is nevertheless a peril of the sea, although the owner would be precluded from recovering because of his own wilful knowledge. This case clearly recognizes the principle for which we are contending.

The case of *Cohen v. National Benefit Association*, K. B. D., reported in 40 Times Reports 347, is very similar to the case at bar. The insured vessel was a submarine which was being dismantled. During the dismantling operations, openings were carelessly left through which the water leaked in, causing the submarine to sink. The underwriters defended on the ground that the loss was not caused by a peril of the sea, but was due to a lack of due care in the dismantling operations. The court (Bailhache, J.) found as a fact that the loss was due to negligence in dismantling and held,

"The unintentional admission of sea water into a ship whereby the ship was caused to sink was a peril of the sea."

The case of *Redman v. Wilson*, cited in our original brief (p. 30), is decided upon the same principle. There the vessel was seaworthy at the commencement of the risk, but at the intermediate port she was so unskillfully loaded that on commencing her voyage home she was unable to keep the sea, not because of a tempestuous condition of the sea, but because of the manner in which she had been loaded; and under those conditions she was intentionally and purposely run ashore to prevent her sinking in the river. The court held that her loss was due to a peril within the policy.

The principle underlies all collision cases where the insured vessel is solely at fault: When a ship is negligently navigated and as a result comes into collision with another ship, or runs against the shore, or against a pier, and as a result founders, the only fortuitous or unexpected element to be found is the negligence of the crew in their navigation of the vessel. If they negligently run the ship against a pier and open a hole through which water enters and she sinks, the sinking is due to

the faulty navigation, but the underwriter is liable on his policy.

In *Orient Ins. Co. v. Adams*, 123 U. S. 67, the only fortuitous circumstance contributing to the loss was the negligent act of the master in casting her loose from her moorings into the river current when she had no steam to enable her to withstand the force of the current. When the policy in that case attached, the risk that the master might negligently turn his boat into the river current when she had no steam was something that "might happen"; but after the boat was once cast into the current without steam, the drifting over the falls was an event that "*must* happen"—it was natural, normal, normal and inevitable.

When this vessel left Olympia on the voyage to Seattle, it was contemplated that she would or might stop at Tacoma and take on additional cargo. There was a possibility—not a certainty—that the master and crew, through bad judgment, negligence or carelessness, might so trim the ship when this additional cargo was placed on board as to make her tender and topheavy and unable to withstand the dangers incurred in passing through the tide rips and cross currents and other sea conditions to be encountered on the remainder of the

voyage. It was against such risks, among others, that indemnity was taken. The only precaution the owner could take against such a risk in advance or at the time of the commencement of the voyage, was to see that his vessel was seaworthy and placed in charge of competent officers and crew. The subsequent management and navigation of the vessel was necessarily left to the judgment of the master. Unless this risk is covered by a policy of this kind, the shipper of cargo is necessarily exposed to the danger of losses without any known method of securing protection against this risk. The owner of a vessel is not liable under the Harter Act for a loss of cargo due to fault or error in the management or navigation of the vessel; and if this Court should hold that the underwriter is equally exempt from liability where the loss is partly attributable to such fault or error, then the shipper is left to bear the risk alone.

In the case of *Waters v. The Merchants Louisville Ins. Co.*, 11 Pet. 218, the court, in discussing the general policy of holding underwriters liable for marine perils brought about by the negligence of the officers, states:

"If negligence of the master or crew, were under such circumstances a good defense, it would be

perfectly competent and proper to examine on the trial any single transaction of the whole voyage, and every incident of the navigation of the whole voyage, whether there was due diligence in all respects, in hoisting or taking in sail, in steering the course, in trimming the ship, in selecting the route, in stopping in port, in hastening or retarding the operations of the voyage, for all these might be remotely connected with the loss. If there had been more diligence, or less negligence, the peril might have been avoided, or escaped, or never encountered at all. Under such circumstances, the chance of a recovery upon a policy for any loss, from any peril insured against, would of itself be a risk of no inconsiderable hazard."

The loss in this case, however, is shown to be due, in part at least, to the unusual or abnormal action of the sea. The finding of the trial court was that the sinking of the vessel was caused by her being in such tender and unfit condition, owing to the manner in which the Tacoma cargo was trimmed in the vessel, as to be unable to withstand the effect of the tide rips or cross currents. That these tide rips and cross currents create a more or less abnormal and dangerous condition of the sea and imperil the navigation of small vessels of the size of the "Rubiayat" when fully loaded, and particularly when badly trimmed, is of course obvious to anyone. They might, and probably

would be, without material effect upon large vessels. That these cross currents and tide rips, acting upon this vessel when the master's unskillful trimming had rendered her topheavy and tender, caused the sinking, is the substance of the court's finding. The fact that she would have withstood the effect of these disturbed conditions of the sea if she had been properly trimmed, does not affect the result. The unskillful trimming was the unforeseen and unexpected act of the master during the voyage and after the policy attached.

That finding, in our opinion, brings the case squarely within the principle which decided the case of *Dixon v. Sadler*, cited in our original brief. In that case the master had removed the ship's ballast, thereby of course rendering her tender and topheavy. She struck rough weather or a squall, which she would have withstood successfully if she had proper ballast, but which she was unable to withstand in her then tender condition, and she foundered. The court held that the loss was within the terms of the policy. The principle there established is that if the vessel encounters sea conditions which she would successfully withstand if in a seaworthy state, but which she is unable to withstand owing to her then unseaworthy

condition caused by acts of the master after the voyage began, the loss is within the policy.

The damage to plaintiff's goods was caused by coming in contact with sea water; that was the proximate cause of the loss, and it was clearly a marine loss. If we go back of that last incident causing the loss, we find that the cause of the goods coming in contact with the sea water was the capsizing of the vessel, which in turn was caused by the effect of the tidal and river cross currents acting upon the vessel when topheavy and tender, and possibly to some extent to improvidence in changing her course; and this condition of the vessel was, in turn, caused by the negligent act of the master in improperly stowing the Tacoma cargo—events that were unforeseen and unexpected when the vessel sailed from Olympia and when the policy attached. We have here all of the essentials of a "peril of the sea," as that phrase is defined in the cases and commonly understood in shipping and mercantile circles. Defendant cites no case, and we have found none, which denies recovery for a loss caused by capsizing, foundering or stranding, when the casualty was attributable even to the normal action of the sea upon a vessel

rendered unfit to withstand such action by the negligent act of the master during the voyage and after the policy had attached.

Respectfully submitted,

W. H. BOGLE,
LAWRENCE BOGLE,
FRANK E. HOLMAN,
Attorneys for Plaintiff in Error.

No. 4679

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

OLYMPIA CANNING COMPANY,
a corporation,
Plaintiff in Error,

vs.

THE UNION MARINE INSURANCE COMPANY,
LTD., a corporation,
Defendant in Error.

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

Closing Brief for Defendant in Error.

S. HASKET DERBY,
CARROLL SINGLE,
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FILED
NOV 20 1925

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a corporation,
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Closing Brief for Defendant in Error.

In its reply brief (as on the oral argument) plaintiff in error has completely shifted its position. In its opening brief, it clearly and definitely took the position that *a sinking alone* was a peril of the sea (see pp. 13, 14, 25, 34, 40, 42). It *now* takes the *new* position that, while foundering alone is *not* a sea peril, yet, if a vessel is seaworthy when the policy attaches and "some unexpected and unforeseen event occurs there-

after during the course of the voyage, which changes her condition, and which event in conjunction with the action of the sea, whether calm or tempestuous, causes the vessel to founder", then the loss becomes one by sea perils (brief, p. 6). Appellant then reaches the conclusion that the negligent overloading of the vessel at Tacoma *was* such an event. In other words, its contention is that loss *caused by overloading* is a loss by sea perils.

We submit that, to adopt the contention in question, would be to greatly broaden the general understanding of the term "perils of the sea" and to revolutionize the law of marine insurance. Although the courts have apparently departed from the early view of the Supreme Court that perils of the sea comprise losses "from *extraordinary* occurrences only" (*Hazard* case, 8 Peters 557, 585) and they now include "*severe* storms, *rough* seas and even fogs" (*Aetna* case, 273 Fed. 5), they have not yet, we submit, reached the point where they will hold that a sinking from "the ordinary action of the winds and waves" is insured against. In fact, under the express terms of the English Marine Insurance Act, such a loss is *not* covered by the policy.

We again wish to make clear the distinction made in our opening brief on this point. If a loss *is* caused by sea perils, then it makes no difference that the loss would not have occurred but for some act of negligence by the crew (as in *Dixon v. Sadler* and *Redman v. Wilson,* distinguished in our opening brief, pp. 27 and 29), or by the vessel being unseaworthy, when there is

no warranty of seaworthiness (as in *Dudgeon v. Pembroke*). We further contend, however, that, if no sea perils are encountered and the loss is caused *solely* by the unseaworthiness of the vessel or the negligence of the crew, then the loss is not a loss by sea perils and is not recoverable (see cases cited in our opening brief, pp. 18 to 25).

Plaintiff in error has, in its reply brief, cited a number of new cases, i. e. new in this court. All of them were cited in the briefs in the lower court, but some were excluded from plaintiff's opening brief (for what reason we are unaware). We shall briefly refer to these cases in the order in which they are cited.

In *Davidson v. Burnand,* L. R. 4 C. P. 117, recovery was allowed through the vessel's sea cocks or valves being left open below the water line, so that, when she got down to that point, the sea water flowed in and damaged the cargo. We believe that this case is to be distinguished by its having been decided prior to the passage of the Marine Insurance Act and we doubt whether it would be followed today. The decision seems to us contrary to the cases cited in our opening brief (pp. 18-25) and to the views of the House of Lords in *Frazer v. Pandorf* and *P. Samuel & Co. v. Dumas,* hereinafter referred to, and an expressly contrary result was reached in *Mannheim Ins. Co. v. Clarke,* 157 S. W. 291 (cited in our opening brief), where the court, after a review of both English and American law as to the meaning of the term "perils of the sea", said (at p. 298):

> "Authorities on this point might be multiplied, but we think that these quoted are sufficient for the conclusion that the sinking of the tug Seminole, proximately caused by the negligence of some member or members of its crew in failing to close the sea valve, was not a loss due to the 'adventures and perils of the harbors, bays, sounds, seas, rivers', etc., and therefore the loss was not covered by the policy sued on."

In that case the lower court instructed the jury that perils of the sea "denote *the natural accidents peculiar to those elements which do not happen by the intervention of man, nor are to be prevented by human prudence*" —a definition in almost exact accordance with definitions given by the House of Lords in the two cases above mentioned.

The *Davidson* case is, however, clearly distinguishable on its facts, as the *failure* to close the sea cocks (which at the time were above the water) was quite different from the affirmative action of the master of the "Rubaiyat" in overloading his vessel. In the case at bar there was no leak of any kind and the vessel simply toppled over from the weight of her own cargo.

Frazer v. Pandorf, 12 App. Cases 518 (examined by us as reported in VI Asp. Mar. Cases 212), involved the entrance of water into a seaworthy ship through a hole gnawed by rats. This was considered a fortuitous accident or casualty of the sea, for which no one was to blame, whereas in the case at bar the ship became unseaworthy through overloading and such unseaworthiness directly caused her loss. Lord Bram-

well in the *Pandorf* case (VI Asp. at p. 214) expressly approved the definition of Lopes, L. J., in the lower court that a peril of the sea is "a sea-damage occurring at sea, and nobody's fault" (this language also being cited with approval by the House of Lords in *P. Samuel & Co. v. Dumas,* 29 Com. Cases at p. 250).*

The opinion of Judge Lopes is reported in full in V Asp. Mar. Cases 568, and he there says in part (at p. 570):

> "It seems, therefore, that directly the real or effective cause of the loss is some act of man, the loss cannot be ascribed to 'dangers or accidents of the sea'."

This language, twice approved by the House of Lords, would clearly exclude the loss in the case at bar, which was caused by the gross negligence of the master of the "Rubaiyat"—plainly "an act of man" and not a "fortuitous accident or casualty of the sea".

The next case cited by plaintiff is *P. Samuel & Co. v. Dumas,* 29 Com. Cases 238, in which, as has already been noted, the definition of sea perils as "a sea-damage occurring at sea and nobody's fault" is expressly approved (opinion of Viscount Cave at p. 250). This case when examined will be found to be strongly in defendant's favor. One of the suits involved was by an innocent mortgagee and, as stated by plaintiff, Lord Sumner held that, as against the mortgagee, the

*NOTE: Of course this language, as used by the House of Lords, does not refer to stranding or collision cases, which rest on different principles (see our opening brief, p. 29), but it applies with peculiar force to the case at bar.

scuttling was a loss by sea perils. *All* of the other judges in the House of Lords, however, held to the contrary and the decision on this point is nowhere better expressed than by Viscount Finlay (at pp. 256-257):

> "The view that the proximate cause of the loss when the vessel has been scuttled is the inrush of the sea water, and that this is a peril of the sea, is inconsistent with the well-established rule that it is always open to the underwriter on a time policy to show that the loss arose not from perils of the seas but from the unseaworthy condition in which the vessel sailed (see 'Arnold on Marine Insurance', section 799). *When the vessel is unseaworthy and the water consequently gets into the vessel and sinks her, it would never be said that the loss was due to the perils of the sea.* It is true that the vessel sunk in consequence of the inrush of water, but this inrush was due simply to the unseaworthiness. The unseaworthiness was the proximate cause of the loss. Exactly the same reasoning applies to the case of scuttling, the hole is there made in order to let in the water. The water comes in and the vessel sinks. The proximate cause of the loss is the scuttling, as in the other case the unseaworthiness. *The entrance of the water cannot be divorced from the act which occasioned it.*"

It will be noted that Lord Finlay expressly likens the inrush of the sea water caused by the scuttling to an inrush due to unseaworthiness and cites the *Sassoon* case on this very point. It is respectfully submitted that, in the case at bar, the capsizing of the "Rubaiyat" cannot "be divorced from the act which occasioned it".

The case of *Cohen v. National Benefit Association,* 40 Times Reports 347, was a case of an insurance on a submarine while being dismantled and was against "all and every risk", which, of course, covered the situation (see defendant's opening brief, p. 17). The case is not satisfactorily or fully reported and we are not at all satisfied that the court used the language quoted on page 16 of appellant's brief and, if it did, it was pure dicta. Moreover, perils of the sea, while *dismantling* a submarine, might obviously be very different from such perils in other cases.

The other cases cited by plaintiff have already been commented on in our opening brief or else need no comment.

Plaintiff implies in its brief (p. 18) that, in a case like that at bar, the shipowner is protected by the Harter Act and, if the insurance company is not held liable, the shipper is left to bear the risk alone. But the damage in this case and like cases is caused by *improper stowage* and *unseaworthiness,* for which, under the Harter Act, the ship is expressly made liable and the result in question therefore does not follow. Overloading is an entirely different thing from faults or errors of navigation. And we think it may be asserted as a general principle that where, as in this case, the carrier is liable, the underwriter is usually *not* liable.

Plaintiff complains of our claim that the finding of the lower court that the loss was not caused by perils

insured against is conclusive. It will be noted that in our opening brief (p. 9) that contention is confined to the currents encountered by the vessel and the court's finding that those currents were not sea perils *is* conclusive. Plaintiff says that "these tide rips and cross currents create a more or less *abnormal* and *dangerous* condition of the sea" (brief, p. 19). The word "tide rips" does not appear anywhere in the findings and the lower court clearly found that the *currents* were *not* abnormal and *not* dangerous, for, if they had been abnormal or dangerous, the decision would have been different. The fact is, as pointed out by us, that the currents were "well known" and operated on *all* vessels *ever* leaving Tacoma and the question whether they were perils of the sea was a question of *fact* depending on the evidence and, as to which, the findings below are conclusive.

Of course, however, if *overloading* a vessel is a peril of the sea, as plaintiff now contends, the court's finding on *that* point *is* a conclusion of law.

We respectfully submit, in closing, that the overloading of a vessel so as to make her "topheavy, unstable, tender and unfit" (Record, p. 36)—in other words, unseaworthy—is *not* a peril of the sea. We further submit that a loss due *solely* to unseaworthiness, as this loss was, is *not* a loss caused by sea perils and that it matters not whether that unseaworthiness was present when the policy attached or was later brought about by the gross neglect of her master. It it quite true that plaintiff's goods were damaged by

salt water, but "THE ENTRANCE OF THE WATER CANNOT BE DIVORCED FROM THE ACT WHICH OCCASIONED IT".

Dated November 20, 1925.

Respectfully submitted,

S. HASKET DERBY,
CARROLL SINGLE,
BRUCE C. SHORTS,
Attorneys for Defendant in Error.

CERTIFICATE OF SERVICE.

I, S. Hasket Derby, hereby certify that I made service of the above closing brief by mailing three copies of the same to W. H. Bogle, Lawrence Bogle and Frank E. Holman, attorneys for plaintiff in error, at their office 609 Central Building, Seattle, Washington, this 20th day of November, 1925.

S. HASKET DERBY,
Of Counsel for Defendant in Error.

No. 4680

United States

Circuit Court of Appeals

For the Ninth Circuit.

OREGON-AMERICAN LUMBER COMPANY, a Corporation,

Plaintiff in Error,

vs.

MABEL SIMPSON, and WAYNE DEAN SIMPSON, EARL SIMPSON and JOYCE SIMPSON, Minors, by MABEL SIMPSON, Their Guardian *ad Litem*,

Defendants in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Oregon.

FILED
SEP 28 1925
F. D. MONCKTON,
CLERK

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 4680

United States

Circuit Court of Appeals

For the Ninth Circuit.

OREGON-AMERICAN LUMBER COMPANY, a Corporation,

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

W. LAIR THOMPSON and RALPH H. KING, Northwestern Bank Building, Portland, Oregon,
For the Plaintiff in Error.

WILLIAM P. LORD and ARTHUR I. MOULTON, Spalding Building, Portland, Oregon,
For the Defendants in Error.

In the District Court of the United States for the District of Oregon.

MABEL SIMPSON and WAYNE DEAN SIMPSON, EARL SIMPSON and JOYCE SIMPSON, Minors, by MABEL SIMPSON, Their Guardian ad Litem,

Plaintiffs,

vs.

OREGON-AMERICAN LUMBER COMPANY, a Corporation,

Defendant.

CITATION ON WRIT OF ERROR.

United States of America.

To Mabel Simpson, Wayne Dean Simpson, Earl Simpson and Joyce Simpson, GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to he holden in the city of San Francisco, California, in said cir-

cuit, on the 23 day of August next, pursuant to the writ of error filed in the clerk's office of the District Court of the United States for the District of Oregon, wherein Oregon-American Lumber Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable R. S. BEAN, District *Court* of the United States, at Portland, Oregon, within said circuit, this 24 day of July, A. D. 1925.

R. S. BEAN,
United States District Judge. [1*]

District of Oregon,
State of Oregon,
County of Multnomah,—ss.

Service of the foregoing citation is hereby admitted by the receipt within the district, state and county aforesaid of a duly certified copy this 24 day of July, A. D. 1925.

WM. P. LORD,
One of Attorneys for Plaintiffs. [2]

[Endorsed]: No. L.–9520. 36–62. In the District Court of the United States for the District of Oregon. Mabel Simpson et al., Plaintiffs, vs. Oregon-American Lumber Company, Defendant. Citation. U. S. District Court, District of Oregon. Filed Jul. 24, 1925. G. H. Marsh, Clerk. [3]

*Page-number appearing at foot of page of original certified Transcript of Record.

In the United States Circuit Court of Appeals for the Ninth Circuit.

MABEL SIMPSON, WAYNE DEAN SIMPSON, EARL SIMPSON and JOYCE SIMPSON, Minors, by MABEL SIMPSON, Their Guardian ad Litem,

Plaintiffs,

vs.

OREGON-AMERICAN LUMBER COMPANY, a Corporation,

Defendant.

WRIT OF ERROR.

The United States of America,
Ninth Judicial Circuit,—ss.

The President of the United States, to the Honorable Judges of the District Court of the United States for the District of Oregon, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court before you, or some of you, between Mabel Simpson and Wayne Dean Simpson, Earl Simpson and Joyce Simpson, by Mabel Simpson, their guardian *ad litem,* plaintiffs, and Oregon-American Lumber Company, defendant, a manifest error hath happened, to the great damage of the said Oregon-American Lumber Company, defendant, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do

command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, California, [4] in said circuit, on the 23d day of August next in the said Circuit Court of Appeals, to be then and there held, that the records and proceedings aforesaid being inspected by said Circuit Court of Appeals, may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 24th day of July, A. D. 1925, and in the 150th year of the Independence of the United States of America.

[Seal] Attest: G. H. MARSH,
Clerk of the District Court of the United States for District of Oregon.

Allowed by

R. S. BEAN,
United States District Judge. [5]

[Endorsed]: In the United States Circuit Court of Appeals for the Ninth Circuit. Mabel Simpson et al., Plaintiffs, vs. Oregon-American Lumber Company, Defendant. Writ of Error. Filed July 24, 1925. G. H. Marsh, Clerk, United States District Court, District of Oregon. [6]

In the District Court of the United States for the District of Oregon.

November Term, 1924.

BE IT REMEMBERED, That on the 22d day of December, 1924, there was duly filed in the District Court of the United States for the District of Oregon, a transcript of record on removal from the Circuit Court of the State of Oregon for Columbia County, the complaint contained therein being in words and figures as follows, to wit: [7]

In the Circuit Court of the State of Oregon for the County of Columbia.

MABEL SIMPSON and WAYNE DEAN SIMPSON, EARL SIMPSON and JOYCE SIMPSON, Minors, by MABEL SIMPSON, Their Guardian ad Litem,

Plaintiffs,

vs.

OREGON-AMERICAN LUMBER COMPANY, a Corporation, and TROY SMITH,

Defendants.

COMPLAINT.

Plaintiffs for cause of action, complain and allege:

I.

That during his lifetime and until the time of his death, Clyde C. Simpson was the husband of plaintiff Mabel Simpson, and was the father of plain-

tiffs Wayne Dean Simpson, Earl Simpson and Joyce Simpson; that said plaintiffs Wayne Dean Simpson, Earl Simpson and Joyce Simpson are minors under the age of fourteen years, to wit: said Wayne Dean Simpson is of the age of one year, Earl Simpson is of the age of three years, and Joyce Simpson is of the age of four years, and by order of this court, said Mabel Simpson has been appointed and has qualified and is now duly appointed, qualified and acting guardian *ad litem* of and for the said Wayne Dean Simpson, Earl Simpson and Joyce Simpson for the purpose of bringing and prosecuting this action.

II.

That defendant Oregon-American Lumber Company, a corporation is now and during all the times herein mentioned has been a corporation organized and existing under and by virtue of the laws of the State of Utah, transacting business in the State of Oregon, with its principal place of business in Oregon at Vernonia, in *in* Columbia County, Oregon, and during all of the times herein mentioned, said defendant Oregon-American Lumber Company has been engaged in the business of running a general saw and lumbering mill at Vernonia, in Columbia County, Oregon, and in and about said lumber mill it employed, during all the times herein mentioned, large numbers of men. [8]

III.

That in the operation of said mill, said defendant employed electric driven saws, rollers, gang-edgers and other machinery and devices, and all

of the work carried on by said defendant in and about said mill was extremely hazardous and dangerous, and involved great risk and danger to the employees engaged therein.

IV.

That said work being of a hazardous and dangerous character, as above set forth, and involving the operation of machinery, was carried on by the defendant lumber company at the time hereinafter mentioned, to wit: September 11, 1924, under such circumstances and conditions that defendant Oregon-American Lumber Company had the right and option under the Compensation Act of the State of Oregon to elect whether it would contribute to the fund created by said act, or whether it would refuse to contribute to said fund and reject the benefits of said Act, and prior to said time said defendant lumber company had elected to reject the benefits of said Act and refused to contribute to the fund created thereby, and by reason of such election was not entitled to any of the benefits of said Act, and was subject to all the terms and conditions of said Act regulating corporations engaged in hazardous occupations at said time who rejected the benefits of said Act.

V.

That in and about its said mill the defendant lumber company employed a certain system of live rolls used for the purpose of conveying lumber from one part of its plant to another, and a certain machine known as a gang-edger which con-

sisted of a set of saws operated on a common drum or arbor, each saw being about thirty inches in diameter and about three-eighths of an inch thick, and said saws were so arranged that when [9] large pieces of lumber were propelled against the same, said pieces would be cut at the same time by several of said saws, thereby dividing such lumber into several pieces; for the purpose of driving the lumber against said saws there were in connection with said machine certain so-called live rolls which were caused to revolve by gears driven by steam power, and the lumber to be cut by said saws was put upon said live rolls and thereupon a set of rolls not operated by gears, known as dead rolls, were lowered upon such lumber to hold the same firmly in position so that said live rolls could drive the same against said saws in a direct course; that said dead rolls were held down upon such lumber by a weight of about five hundred pounds, and said machine was equipped with an arrangement of steam operated cylinders and pistons into which steam was admitted by means of valves for the purpose of lifting said dead rolls from said lumber when necessary to admit pieces of lumber into said machine said edger-saws were driven at the rate of about 1,800 to 2,000 revolutions per minute, and were propelled with such terrific force that in the event lumber was permitted to be driven against the same in an irregular or uneven course, or to shift from side to side while being driven against the same, there was great and imminent danger that such lumber

would bind upon said saws and would thereupon be thrown by said saws to different points in and about said mill, with great danger to the employees engaged in said mill, and it was therefore necessary that the valves admitting steam into the cylinders operating said pistons be so adjusted that the same would admit steam in said pistons promptly for the raising of said dead rolls, and that when required to do so by the operator of said edger, would release the steam in said cylinders promptly and completely so as to permit the full force of the weight of said dead rolls to bear upon the lumber being sawed by said edger, so that the same might be held firmly in place and projected against said saws in an even course, [10] and not permitted to change the course at which it started against said saws, and it was likewise extremely hazardous and dangerous in the operation of said edger for the operator thereof to lift the rolls at any time while lumber was being sawed by said saws, because the lifting of such rolls would permit such lumber to bind on said saws with great imminent danger that said lumber would be thrown and propelled by said saws to other parts of the said mill, and would injure employees in said mill.

VI.

That on or about the 11th day of September, 1924, defendant lumber company employed in its said mill the defendant Troy Smith as a general mill foreman, and as such general mill foreman said defendant Troy Smith had charge of the

operation of said edger and of all of defendant lumber company's machinery in and about said mill, and had a right to control and direct the service of the employees engaged therein, and was the person in charge of the work of operating said edger and of keeping the same in repair fit for operation.

VII.

That on and prior to said 11th day of September, 1924, said defendants had carelessly and negligently and in violation of Section 6785, Oregon Laws, permitted said edger and said device for lifting said dead rolls to be out of repair and in a dangerous condition in this: that the valves admitting and releasing the steam into said cylinders for the purpose of operating said pistons to lift said dead rolls had been permitted to be and remain in such condition through some defect in the adjustment thereof which plaintiffs cannot particularly specify, but with which defendants are well acquainted, so that the same would not open and close freely, and that when the steam had [11] been admitted into said cylinders and said rolls had been lifted, and the said valves were released for the purpose of permitting said rolls to drop upon lumber being cut in said edger, the said valves would not promptly release the steam from said pistons and said rolls were thereby kept partially or completely lifted and were prevented from descending on said lumber with sufficient force to hold the same firmly in position, and cause the same to be driven against said saws in

a straight course, and such lumber was by reason thereof apt to stop while being driven against said saws and to bind upon said saws and to be thrown thereby with great force to other parts of said mill.

VIII.

That the aforesaid defective and dangerous condition of said gang-edger had, prior to the said 11th day of September, 1924, been reported to and was known to the defendant Troy Smith, but said Troy Smith, in violation of Section 6787, Oregon Laws, had neglected to see that the precaution was taken of adjusting said valves and repairing said machine so that the same would operate properly and safely, and had carelessly and negligently permitted said machine to be and remain in the dangerous condition aforesaid.

IX.

That on said 11th day of September, 1924, the above-mentioned Clyde C. Simpson was engaged in said work as an employee of said defendant in and about its said mill at a point some thirty feet distant from said gang-edger, and at the opposite end of a system of rolls leading to said gand-edger; that said work was of such a nature that he was obliged to give his undivided attention thereto and was not able to watch or observe the said gang-edger; while said deceased was engaged in his work as aforesaid, by reason of the said defective and dangerous condition of said gang-edger, a piece of lumber that was being run through said edger and was being sawed by certain

of said saws, [12] stopped; said lumber was caused to stop by reason of the fact that said dead rolls were not permitted by said valves to rest upon the same with full force, and thereupon the operator of said gang-edger, who was an employee of defendant, carelessly and negligently repeatedly lifted the said dead rolls and dropped the same, and released the pressure upon said lumber and permitted the same to be loose upon said power-driven lower rolls, whereby said lumber was caused and permitted to bind upon said saws and to be thrown thereby with great force and violence across said mill to the point where said deceased was standing engaged in his work as aforesaid, and to strike deceased in the left leg, and so cut, tore and mangled his said leg and the flesh, muscles and ligaments thereof that deceased was made sick thereby, and as a result thereof died on the 29th day of October, 1924.

X.

That by reason of the liability of said edger to throw boards when the same stopped in the course of being sawed therein, it was necessary and proper that if any board stopped in the course of being sawed by said edger, the operator of said saw should leave the dead rolls upon such board with their full weight, and should stop the lower rolls and the saws of said edger, and then should release such board by raising the top rolls after the machine had been stopped, and it was necessary and proper that such operator, in the event

a board stopped as aforesaid, give immediate warning to all in a position where they might be hit by such board, so that they might protect themselves by getting to a position of safety, but notwithstanding the stopping of said board as aforesaid, the operator of said saw carelessly and negligently failed to stop the said machine, and carelessly and negligently failed to give any warning to any persons, including said deceased, who were in a position of danger, and carelessly and negligently lifted and dropped said [13] top rolls, and the injury to and subsequent death of said deceased were the direct and proximate result of the negligence of said defendants in permitting said edger to be in said defective and dangerous condition, of the negligence of the operator of said machine in omitting to give any warning that said board had stopped and in omitting to immediately stop said machine and the rolls thereof, and in lifting and dropping said dead rolls.

XI.

That at the time of his said injury and death as aforesaid, deceased was a strong, able-bodied, industrious man of the age of twenty-six years, and was able to have earned, accumulated and contributed to the support, maintenance and welfare of these plaintiffs in the course of his natural life the sum of Fifty Thousand Dollars ($50,000.00), and by reason of his injury and death as aforesaid, plaintiffs have been and are damaged in the sum of Fifty Thousand Dollars ($50,000.00).

WHEREFORE plaintiffs pray for judgment

against said defendants in the said sum of Fifty Thousand Dollars (50,000.00) and for their costs and disbursements herein.

LORD & MOULTON,
Attorneys for Plaintiffs.

State of Oregon,
County of Multnomah,—ss.

I, Mabel Simpson, being first duly sworn, depose and say that I am one of the plaintiffs in the above-entitled action; and that the foregoing complaint is true as I verily believe.

Mrs. MABEL SIMPSON.

Subscribed and sworn to before me this 15th day of November, 1924.

[Notarial Seal] A. I. MOULTON,
Notary Public for the State of Oregon.

My commission expires July 15, 1928.

Transcript on Removal. Filed December 22, 1924. G. H. Marsh, Clerk.

[Endorsed]: Filed November 17th, 1924. J. W. Hunt, Clerk. By H. E. Veazie, Deputy. [14]

AND AFTERWARDS, to wit, on the 14th day of February, 1925, there was duly filed in said court a motion to strike out parts of complaint, in words and figures as follows, to wit: [15]

In the District Court of the United States for the District of Oregon.

MABEL SIMPSON and WAYNE DEAN SIMPSON, EARL SIMPSON and JOYCE SIMPSON, Minors, by MABEL SIMPSON, Their Guardian ad Litem,

Plaintiffs,

vs.

OREGON–AMERICAN LUMBER COMPANY, a Corporation,

Defendant.

MOTION TO STRIKE.

Comes now the defendant and moves the Court for an order striking from the complaint, on the ground that the same is immaterial and irrelevant, that portion of paragraph V reading as follows:

" . . . and it was likewise extremely hazardous and dangerous in the operation of said edger for the operator thereof to lift the rolls at any time while lumber was being sawed by said saws, because the lifting of such rolls would permit such lumber to bind on said saws with great and imminent danger that said lumber would be thrown and propelled by said saws to other parts of the said mill, and would injure employees in said mill."

for the reason that this action is one presumably based upon Chapter 14 of Title 38 of Oregon Laws commonly known as the State Employers' Liability Act of the State of Oregon granting to surviving widows and children of persons killed a right of action for the violation of its requirements, and the portion moved against consists of common law negligence, and for which no right of action exists in favor of the surviving widow and children.

And defendant separately moves to strike all of paragraph VIII of the complaint for the same reason as set forth in the first paragraph of this motion and for the additional reason that this cause was removed to this court from the Circuit Court of the State of Oregon for Columbia County as a separable controversy by the Oregon-American Lumber Company, and that the defendant Troy Smith referred to in said paragraph VIII is not a party to the action before this court, and that any violation of the [16] Employers' Liability Act by the said Troy Smith is common-law negligence for which no recovery can be had by the surviving widow and children.

Defendant separately moves to strike the following portion of paragraph IX beginning with the word "and" in line 13 of said paragraph and ending with the word "rolls" in line 17 of said paragraph on page 6 of the complaint:

> " . . . and thereupon the operator of said gang-edger who was an employee of defendant, carelessly and negligently repeatedly lifted the said dead rolls and dropped the same, and re-

leased the pressure upon said lumber and permitted the same to be loose upon said power driven lower rolls,"

for the same reason as set forth in the first paragraph of this motion.

Defendant separately moves to strike all of paragraph X of the complaint except the following lines, beginning with the word "and" in line 17 of said paragraph and ending with the word "condition" in line 20 of said paragraph:

" . . . and the injury to and subsequent death of said deceased were the direct and proximate result of the negligence of said defendants in permitting said edger to be in said defective and dangerous condition,"

for the same reason as set forth in the first paragraph of this motion.

McCAMANT & THOMPSON,
RALPH H. KING,
Attorneys for Defendant.

Filed February 14, 1925. G. H. Marsh, Clerk. [17]

AND AFTERWARDS, to wit, on Monday, the 13th day of April, 1925, the same being the 37th judicial day of the regular March term of said Court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [18]

In the District Court of the United States for the District of Oregon.

No. L–9520.

April 13, 1925.

MABEL SIMPSON and WAYNE DEAN SIMPSON, EARL SIMPSON and JOYCE SIMPSON, Minors, by MABEL SIMPSON, Their Guardian ad Litem,

Plaintiffs,

vs.

OREGON–AMERICAN LUMBER COMPANY, a Corporation,

Defendant.

MINUTES OF COURT—APRIL 13, 1925—ORDER SUSTAINING MOTION TO STRIKE.

This cause was heard by the Court upon the motion of the defendant to strike out that portion of paragraph 5 of plaintiff's complaint set out in said motion, paragraph 8 of said complaint, and portions of paragraph 9 and 10 as set out in said motion, and was argued by Mr. Arthur I. Moulton, of counsel for said plaintiffs, and by Mr. Ralph H. King, of counsel for said defendant.

And the Court being now fully advised in the premises, it is ORDERED AND ADJUDGED that said motion be and the same is hereby sustained. [19]

AND AFTERWARDS, to wit, on the 13th day of April, 1925, there was duly filed in said court, an opinion of the court on motion to strike out in words and figures as follows, to wit: [20]

In the District Court of the United States for the District of Oregon.

April 13, 1925.

L.—9520.

MABEL SIMPSON and WAYNE DEAN SIMPSON, EARL SIMPSON and JOYCE SIMPSON, Minors, by MABEL SIMPSON, Their Guardian ad Litem,

Plaintiffs,

vs.

OREGON-AMERICAN LUMBER COMPANY, a Corporation,

Defendant.

OPINION ON MOTION TO STRIKE.

LORD & MOULTON, for Plaintiffs.

McCAMANT & THOMPSON and RALPH H. KING, for Defendant.

WOLVERTON, District Judge.

This is a motion to strike certain clauses and portions of plaintiff's complaint, on the ground and for the reason that the action is predicated upon what is commonly known as the Employers' Liability Act of the State of Oregon, and that the matter moved to be stricken is indicative of common law

liability. Plaintiff urges that the matter is relevant and material, because of the regulations of the Workman's Compensation Act. My view of the two acts, construed *in pari materia,* is this: If an employer rejects the benefit of the compensation act, an employee may sue the employer for injuries sustained through the negligence of the employer. He has his choice of remedies, as in any other case. He may sue under the Employers' Liability Act, or he may sue upon common law liability; but he cannot combine the two in one cause of action. In such a case, the employer cannot plead as a defense the negligence of a fellow-servant, contributory negligence unless wilful, or that the plaintiff assumed the risk of his employment. It would seem, unquestionably, that plaintiff is suing under the Employers' Liability Act.

The motion to strike will be sustained as to all clauses comprised thereby. [21]

AND AFTERWARDS, to wit, on the 30th day of April, 1925, there was duly filed in said court an amended complaint, in words and figures as follows, to wit: [22]

In the District Court of the United States for the District of Oregon.

MABEL SIMPSON and WAYNE DEAN SIMPSON, EARL SIMPSON and JOYCE SIMPSON, Minors, by MABEL SIMPSON, Their Guardian ad Litem,

Plaintiffs,

vs.

OREGON-AMERICAN LUMBER COMPANY, a Corporation,

Defendant.

AMENDED COMPLAINT.

Now come plaintiffs, and leave of Court first had and obtained, file this their amended complaint, and for cause of action against defendant, complain and allege:

I.

That during his lifetime and until the time of his death, Clyde C. Simpson was the husband of plaintiff Mabel Simpson, and was the father of plaintiffs Wayne Dean Simpson, Earl Simpson and Joyce Simpson; that said plaintiffs Wayne Dean Simpson, Earl Simpson and Joyce Simpson are minors under the age of fourteen years, to wit: said Wayne Dean Simpson is of the age of one year, Earl Simpson is of the age of three years, and Joyce Simpson is of the age of four years, and by order of this Court, said Mabel Simpson has been appointed and has qualified and is now the duly appointed, qualified and acting guardian *ad*

litem of and for the said Wayne Dean Simpson, Earl Simpson and Joyce Simpson for the purpose of bringing and prosecuting this action.

II.

That defendant Oregon-American Lumber Company, a corporation, is now and during all the times herein mentioned has been a corporation organized and existing under and by virtue of the laws of the State of Utah, transacting business in the State of Oregon, with its principal place of business in Oregon at Vernonia, in Columbia County, Oregon, and during all of the times herein mentioned, said defendant Oregon-American Lumber Company has been engaged in the business of running a general saw and lumbering [23] mill at Vernonia, in Columbia County, Oregon, and in and about said lumber mill it employed, during all the times herein mentioned, large numbers of men.

III.

That in the operation of said mill, said defendant employed electric driven saws, rollers, gang-edgers and other machinery and devices, and all of the work carried on by said defendant in and about said mill was extremely hazardous and dangerous, and involved great risk and danger to the employees engaged therein.

IV.

That said work being of a hazardous and dangerous character, as above set forth, and involving the operation of machinery, was carried on by the defendant lumber company at the time hereinafter

mentioned, to wit: September 11, 1924, under such circumstances and conditions that defendant Oregon-American Lumber Company had the right and option under the Compensation Act of the State of Oregon to elect whether it would contribute to the fund created by said act, or whether it would refuse to contribute to said fund and reject the benefits of said act, and prior to said time said defendant lumber company had elected to reject the benefits of said act and refused to contribute to the fund created thereby, and by reason of such election was not entitled to any of the benefits of said act, and was subject to all of the terms and conditions of said act regulating corporations engaged in hazardous occupations at said time who rejected the benefits of said act.

V.

That in and about its said mill the defendant lumber company employed a certain system of live rolls used for the purpose of conveying lumber from one part of its plant to another, and a certain machine known as a gang-edger which consisted of a set of saws operated on a common drum or arbor, each saw being about thirty inches in diameter and about three-eighths of an [24] inch thick, and said saws were so arranged that when large pieces of lumber were propelled against the same, said pieces would be cut at the same time by several of said saws, thereby dividing such lumber into several pieces; for the purpose of driving the lumber against said saws there were in connection with said machine certain so-called live rolls

which were caused to revolve by gears driven by steam power, and the lumber to be cut by said saws was put upon said live rolls and thereupon a set of rolls not operated by gears, known as dead rolls, were lowered upon such lumber to hold the same firmly in position so that said live rolls could drive the same against said saws in a direct course; that said dead rolls were held down upon such lumber by a weight of about five hundred pounds, and said machine was equipped with an arrangement of steam operated cylinders and pistons into which steam was admitted by means of valves for the purpose of lifting said dead rolls from said lumber when necessary to admit pieces of lumber into said machine; said edger saws were driven at the rate *rate* of about 1,800 to 2,000 revolutions per minute, and were propelled with such terrific force that in the event lumber was permitted to be driven against the same in an irregular or uneven course, or to shift from side to side while being driven against the same, there was a great and imminent danger that such lumber would bind upon said saws and would thereupon be thrown by said saws to different points in and about said mill, with great danger to the employees engaged in said mill, and it was therefore necessary that the valves admitting steam into the cylinders operating said pistons be so adjusted that the same would admit steam into said pistons promptly for the raising of said dead rolls, and that when required to do so by the operator of said edger, would release the steam in said cylinders promptly and completely so as to permit the

full force of the weight of said dead rolls to bear upon the lumber being sawed by said edger, so that the same might be held firmly in place and projected against said saws in an even course, and not permitted to change the course at [25] which *is* started against said saws.

VI.

That on and prior to said 11th day of September, 1924, said defendant had carelessly and negligently and in violation of Section 6785, Oregon Laws, permitted said edger and said device for lifting said dead rolls to be out of repair and in a dangerous condition in this: that the valves admitting and releasing the steam into said cylinders for the purpose of operating said pistons to lift said dead rolls had been permitted to be and remain in such condition through some defect in the adjustment thereof which plaintiffs cannot particularly specify, but with which defendant is well acquainted, so that the same would not open and close freely, and that when the steam had been admitted into said cylinders and said rolls had been lifted, and the said valves were released for the purpose of permitting said rolls to drop upon lumber being cut in said edger, the said valves would not promptly release the steam from said pistons and said rolls were thereby kept partially or completely lifted and were prevented from descending on said lumber with sufficient force to hold the same firmly in position, and cause the same to be driven against said saws in a straight course, and such lumber was by reason thereof apt to stop while being driven

against said saws and to bind upon said saws and to be thrown thereby with great force to other parts of said mill.

VII.

That on said 11th day of September, 1924, the above mentioned Clyde C. Simpson was engaged in said work as an employee of said defendant in and about its said mill at a point some thirty feet distant from said gang-edger, and at the opposite end of a system of rolls leading to said gang-edger; that said work was of such a nature that he was obliged to give his undivided attention thereto and was not able to watch or observe the said gang-edger; while said deceased was engaged in his work as aforesaid, by reason of the said defective [26] and dangerous condition of said gang-edger, a piece of lumber that was being run through said edger and was being sawed by certain of said saws, stopped; said lumber was caused to stop by reason of the fact that said dead rolls were not permitted by said valves to rest upon the same with full force, whereby said lumber was caused and permitted to bind upon said saws and to be thrown thereby with great force and violence across said mill to the point where said deceased was standing engaged in his work as aforesaid, and to strike deceased in the left leg, and so cut, tore and mangled his said leg and the flesh, muscles and ligaments thereof that deceased was made sick thereby and as a result thereof died on the 29th day of October, 1924, and the injury to and subsequent death of said deceased were the direct and proximate re-

sult of the negligence of said defendants in permitting said edger to be in said defective and dangerous condition.

VIII.

That at the time of his said injury and death as aforesaid, deceased was a strong, able-bodied, industrious man of the age of twenty-six years, and was able to have earned, accumulated and contributed to the support, maintenance and welfare of these plaintiffs in the course of his natural life the sum of Fifty Thousand Dollars ($50,000.00), and by reason of his injury and death as aforesaid, plaintiffs have been and are damaged in the sum of Fifty Thousand Dollars ($50,000.00). [27]

IX.

That plaintiffs are residents and inhabitants of the State of Oregon, and residents and inhabitants of a different state than defendant.

X.

That defendant is a resident and inhabitant of the State of Utah, and a resident and inhabitant of a different state than plaintiffs.

XI.

That the amount involved in this action is greater and in excess of Three Thousand Dollars, exclusive of interest and costs.

WHEREFORE, plaintiffs pray for a judgment against said defendant in the said sum of Fifty Thousand Dollars ($50,000.00) and for their costs and disbursements herein.

LORD & MOULTON,
Attorneys for Plaintiffs.

State of Oregon,
County of Multnomah,—ss.

I, Mabel Simpson, being first duly sworn on oath say: I am one of the plaintiffs named in the within entitled action; that I know the contents of the foregoing amended complaint and believe the same to be true.

MABEL SIMPSON.

Subscribed and sworn to before me this 30th day of April, 1925.

[Seal] MARIE BENNETT,
Notary Public for Oregon.

Commission expires Mar. 5, 1929.

Service of copy of the foregoing amended complaint is hereby admitted in Multnomah County, Oregon, this 30 day of April, 1925.

McCAMANT & THOMPSON,
Attorney for Defendant.

Filed April 30, 1925. G. H. Marsh, Clerk. [28]

AND AFTERWARDS, to wit, on the 12th day of May, 1925, there was duly filed in said court an answer to amended complaint, in words and figures as follows, to wit: [29]

In the District Court of the United States for the District of Oregon.

MABEL SIMPSON and WAYNE D. SIMPSON, EARL SIMPSON and JOYCE SIMPSON, Minors, by MABEL SIMPSON, Their Guardian ad Litem,

Plaintiffs,

vs.

OREGON-AMERICAN LUMBER COMPANY, a Corporation,

Defendant.

ANSWER TO AMENDED COMPLAINT.

Comes now the defendant and for its answer to the amended complaint filed herein admits, denies and alleges as follows:

I.

Denies all knowledge or information of the matters alleged in paragraph I of the amended complaint sufficient to form a belief and therefore denies the same.

II.

Admits the allegations of paragraph II of the amended complaint.

III.

Answering the allegations of paragraph III of the amended complaint, defendant admits that defendant employed various saws, rollers, gang-edgers and other machinery in the operation of its mill. Denies each and every other allegation contained in paragraph III of the amended complaint.

IV.

Denies each and every allegation contained in paragraph IV of the amended complaint, except this defendant admits that it is not contributing to the State Industrial Fund of the State of Oregon.

V.

Answering the allegations of paragraph V defendant admits that it used the machine known as a gang-edger, consisting of a number of saws, for the purpose of dividing lumber into several pieces at one operation. Denies each and every other allegation contained in paragraph V of the amended complaint. [30]

VI.

Denies each and every allegation contained in paragraph VI of the amended complaint.

VII.

Answering the allegations of paragraph VII of the amended complaint, defendant admits that, while employed by this defendant, Clyde C. Simpson received an injury. This defendant denies each and every other allegation contained in paragraph VII of the amended complaint.

VIII.

Denies each and every allegation contained in paragraph VIII.

IX.

Admits the allegations of paragraph IX.

X.

Admits the allegations of paragraph X.

XI.

Denies each and every allegation contained in paragraph XI.

McCAMANT & THOMPSON,
RALPH H. KING,
Attorneys for Defendant.

District of Oregon,—ss.

I, James G. Wilson, being first duly sworn, depose and say that I am the attorney in fact in the State of Oregon for Oregon-American Lumber Company, a corporation, the within named defendant; that I have read the foregoing answer and that the same is true as I verily believe.

JAMES G. WILSON.

Subscribed and sworn to before me this 12th day of May, 1925.

[Seal] LYNDON L. MYERS,
Notary Public for Oregon.

My commission expires Apr. 30, 1929.

Due service of the within answer is admitted this 12 day of May, 1925.

LORD & MOULTON,
Attorneys for Plaintiffs.

Filed May 12, 1925. G. H. Marsh, Clerk. [31]

AND AFTERWARDS, to wit, on the 15th day of June, 1925, there was duly filed in said Court, a verdict, in words and figures as follows, to wit: [32]

In the District Court of the United States for the District of Oregon.

L.–9520.

MABEL SIMPSON and WAYNE DEAN SIMPSON, EARL SIMPSON, and JOYCE SIMPSON, by MABEL SIMPSON, their Guardian ad Litem,

Plaintiffs,

vs.

OREGON-AMERICAN LUMBER COMPANY, a Corporation,

Defendant.

VERDICT.

We, the jury empaneled and sworn in the above-entitled cause, find our verdict for the plaintiffs and assess their damages in the sum of Fifteen Thousand Dollars ($15,000.00).

W. C. INMAN,
Foreman.

June 15, 1925.

Filed June 15, 1925. G. H. Marsh, Clerk. [33]

AND AFTERWARDS, to wit, on Monday, the 15th day of June, 1925, the same being the 91st Judicial day of the regular March Term of said Court,—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding,—the following proceedings were had in said cause, to wit: [34]

In the District Court of the United States for the District of Oregon.

No. L.–9520.

June 15, 1925.

MABEL SIMPSON and WAYNE DEAN SIMPSON, EARL SIMPSON and JOYCE SIMPSON, by MABEL SIMPSON, Their Guardian ad Litem,

Plaintiffs,

vs.

OREGON-AMERICAN LUMBER COMPANY, a Corporation,

Defendant.

MINUTES OF COURT—JUNE 15, 1925—JUDGMENT.

Now at this day come the plaintiffs by Mr. Arthur I. Moulton, of counsel, and the defendant by Mr. Ralph H. King, of counsel, whereupon the jury impaneled herein being present answer to their names. Whereupon this cause having been heard upon the motion of the defendant for a directed verdict, upon consideration thereof

IT IS ORDERED that said motion be and the same is hereby denied.

Whereupon the trial of this cause is resumed, and the jury having heard the evidence adduced, the arguments of counsel and the charge of the Court retire in charge of proper sworn officers to consider

of their verdict. And thereafter said jury returns into court the following verdict, viz.:

> "We, the jury empaneled and sworn in the above-entitled cause, find our verdict for the plaintiffs and assess their damages in the sum of Fifteen Thousand Dollars ($15,000).
>
> June 15, 1925.
>
> W. C. INMAN,
> Foreman."

which verdict is received by the Court and ordered to be filed. Whereupon

IT IS ADJUDGED that the plaintiffs herein do have and recover of and from the defendant the sum of $15,000.00, together with their costs and disbursements herein taxed in the sum of $162.-25, and that they do have execution therefor. [35]

AND AFTERWARDS, to wit, on the 24th day of July, 1925, there was duly filed in said court a petition for writ of error in words and figures as follows, to wit: [36]

In the District Court of the United States for the District of Oregon.

AT LAW.

MABEL SIMPSON and WAYNE DEAN SIMPSON, EARL SIMPSON and JOYCE SIMPSON, Minors, by MABEL SIMPSON, Their Guardian ad Litem,

Plaintiffs,

vs.

OREGON-AMERICAN LUMBER COMPANY, a Corporation,

Defendant.

PETITION FOR WRIT OF ERROR.

And now comes Oregon-American Lumber Company, a corporation, defendant herein, and says that on the 15th day of June, 1925, this Court entered judgment herein in favor of the plaintiffs and against this defendant, in which judgment and proceedings had prior thereunto certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

WHEREFORE, this defendant prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit for the correction of the errors so complained of and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals for the Ninth Circuit; and this defendant also prays that an

order be made fixing the amount of security which the defendant should give upon said writ of error, and that upon the giving of said security said writ of error shall operate as a supersedeas upon said judgment.

W. LAIR THOMPSON,
RALPH H. KING,
Attorneys for Defendant.

Filed July 24, 1925. G. H. Marsh, Clerk. [36½]

AND AFTERWARDS, to wit, on the 24th day of July, 1925, there was duly filed in said court, an assignment of errors, in words and figures as follows, to wit: [37]

In the District Court of the United States for the District of Oregon.

MABEL SIMPSON and WAYNE DEAN SIMPSON, EARL SIMPSON and JOYCE SIMPSON, Minors, by MABEL SIMPSON, Their Guardian ad Litem,

Plaintiffs,

vs.

OREGON-AMERICAN LUMBER COMPANY, a Corporation,

Defendant.

ASSIGNMENTS OF ERROR.

And now on this 24th day of July, A. D. 1925, comes the defendant Oregon-American Lumber Company, a corporation, by its attorneys, W. Lair Thompson and Ralph H. King, and says that the

judgment entered in the above cause on the 15th day of June, 1925, is erroneous and unjust to the defendant for the following reasons:

I.

That the District Court of the United States for the District of Oregon erred in denying and overruling the motion of the defendant for a directed verdict in its favor, which motion was as follows:

> "At this time the defendant moves the Court for an order directing a verdict in favor of the defendant and against the plaintiff, upon the following grounds: first, that the plaintiffs have not offered any evidence tending to establish any of the charges of negligence alleged in the complaint. Second, that the plaintiffs have not proven their case sufficient to be submitted to the jury. Third, that the plaintiffs have not offered any evidence tending to prove or establishing that the negligence alleged in the complaint was the direct and proximate cause of the injury to Claud Clyde Simpson, the deceased."

WHEREFORE, the defendant prays that the said judgment made and entered on the 15th day of June, 1925, be reversed and that the District Court of the United States for the District of Oregon be directed to reverse said judgment and to direct a verdict in favor of said defendant and

to award said defendant its costs and disbursements incurred in said action.

W. LAIR THOMPSON,
RALPH H. KING,
Attorneys for Defendant. [38]

District of Oregon,
State of Oregon,
County of Multnomah,—ss.

Service of the foregoing assignments of error is hereby admitted by the receipt within the district, state and county aforesaid of a duly certified copy this 24th day of July, A. D. 1925.

WM. P. LORD,
One of Attorneys for Plaintiffs.
July 24, 1925. G. H. Marsh, Clerk. [39]

AND AFTERWARDS, to wit, on Friday, the 24th day of July, 1925, the same being the 17th judicial day of the regular July term of said court,—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding,—the following proceedings were had in said cause, to wit: [40]

In the District Court of the United States for the District of Oregon.

No. L.–9520.

MABEL SIMPSON and WAYNE DEAN SIMPSON, EARL SIMPSON and JOYCE SIMPSON, Minors, by MABEL SIMPSON, Their Guardian ad Litem,

Plaintiffs,

vs.

OREGON–AMERICAN LUMBER COMPANY, a Corporation,

Defendant.

MINUTES OF COURT—JULY 24, 1925—ORDER ALLOWING WRIT OF ERROR.

This 24th day of July, A. D. 1925, came the defendant by its attorneys, W. Lair Thompson and Ralph H. King, and filed herein and presented to the Court its petition praying for the allowance of a writ of error, an assignment of errors intended to be urged by it, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof the Court does allow the writ of error upon the defendant giving bond according to law in the sum of $20,000, which said

bond shall operate as a supersedeas bond and supersede the judgment.

R. S. BEAN,
United States District Judge.

Filed Jul. 24, 1925. G. H. Marsh, Clerk. [41]

AND AFTERWARDS, to wit, on the 24th day of July, 1925, there was duly filed in said court a bond on writ of error, in words and figures as follows, to wit: [42]

In the District Court of the United States for the District of Oregon.

MABEL SIMPSON and WAYNE DEAN SIMPSON, EARL SIMPSON and JOYCE SIMPSON, Minors, by MABEL SIMPSON, Their Guardian ad Litem,

Plaintiffs,

vs.

OREGON-AMERICAN LUMBER COMPANY, a Corporation,

Defendant.

BOND ON WRIT OF ERROR.

KNOW ALL MEN BY THESE PRESENTS, That we, Oregon-American Lumber Company, a corporation organized and existing under the laws of the State of Utah, as principal, and National Surety Company, a corportion organized and existing under the laws of the State of New York, as surety, are held and firmly bound unto Mabel Simpson, and

Wayne Dean Simpson, Earl Simpson and Joyce Simpson, in the full and just sum of Twenty Thousand Dollars $20,000.00, to be paid to the said plaintiffs, their attorneys, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 24th day of July, A. D. 1925.

Whereas, lately in the District Court of the United States for the District of Oregon, in an action in said court between Mabel Simpson, and Wayne Dean Simpson, Earl Simpson and Joyce Simpson, minors, by Mabel Simpson, their guardian *ad litem,* plaintiffs, and Oregon-American Lumber Company, defendant, a judgment was rendered against the said Oregon-American Lumber Company, defendant, and the said Oregon-American Lumber Company having obtained a writ of error and filed a copy thereof in the Clerk's office of said court to reverse the judgment in the aforesaid action and citation directed to the said Mabel Simpson, Wayne Dean Simpson, Earl Simpson and Joyce Simpson, plaintiffs, citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden in the city of San Francisco, California, in said circuit, [43] on the 23d day of August next.

Now the condition of the above obligation is such that if the said Oregon-American Lumber Company shall prosecute said writ of error to effect and

answer all damages and costs, if it fail to make the said plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

OREGON-AMERICAN LUMBER COMPANY.

By RALPH H. KING,
Of Its Attorneys.

NATIONAL SURETY COMPANY.
ROBERT WHYTE,
Resident Vice-President.

[Seal] Attest: ERA QUARNSTROM,
Resident Asst. Secretary.

Countersigned at Portland, Oregon, this 24th day of July, 1925.

NATIONAL SURETY COMPANY.
By ROBERT WHYTE,
Resident Agent.

District of Oregon,
State of Oregon,
County of Multnomah,—ss.

This is to certify, that on this 24th day of July, A. D. 1925, before me, the undersigned, a notary public in and for said county and state, residing therein, duly commissioned and sworn, personally appeared Robert Whyte, known to me to be duly authorized resident vice-president of National Surety Company, the surety above named, and the said Robert Whyte acknowledged to me that he subscribed the name of National Surety Company thereto as surety above named, and the said Robert Whyte acknowledged to me that he subscribed the

name of National Surety Company thereto as surety and his own name as Resident Vice-President, and he acknowledged said instrument to be the free and voluntary act of said surety and for the purposes therein expressed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first in this my certificate written.

[Seal] RALPH H. KING,
Notary Public for Oregon.

My commission expires Feb. 27, 1929. [44]

I hereby approve the foregoing bond on this 24th day of July, A. D. 1925, and order the same to supersede the judgment in the above-entitled cause.

R. S. BEAN,
United States District Judge.

District of Oregon,
State of Oregon,
County of Multnomah,—ss.

Service of the foregoing bond on writ of error is hereby admitted by the receipt within the district, state and county aforesaid of a duly certified copy this 24th day of July, A. D. 1925.

WM. P. LORD,
One of Attorneys for Plaintiffs.

Filed July 24, 1925. G. H. Marsh, Clerk. [45]

AND AFTERWARDS, to wit, on the 27th day of July, 1925 there was duly filed in said court a praecipe of defendant for transcript, in words and figures as follows, to wit: [46]

In the District Court of the United States for the District of Oregon.

MABEL SIMPSON and WAYNE DEAN SIMPSON, EARL SIMPSON and JOYCE SIMPSON, Minors, by MABEL SIMPSON, Their Guardian ad Litem,

Plaintiffs,

vs.

OREGON-AMERICAN LUMBER COMPANY, a Corporation,

Defendant.

PRAECIPE FOR TRANSCRIPT OF RECORD (DEFENDANT).

The Clerk of this court is hereby directed to prepare and certify a copy of the record in the above-entitled cause for the use of the United States Circuit Court of Appeals for the Ninth Circuit, including the following documents:

Amended complaint.
Answer.
Reply.
Verdict.
Judgment.
Petition for writ of error.
Order allowing writ of error.
Writ of error.
Bond on writ of error.
Assignment of error.

Praecipe.
Bill of exceptions.

W. LAIR THOMPSON,
RALPH H. KING,
Solicitors for Appellant and Defendant.

District of Oregon,
State of Oregon,
County of Multnomah,—ss.

Service of the foregoing praecipe by the receipt of a duly certified copy thereof within said district, state and county is hereby admitted this 27th day of July, A. D. 1925.

ARTHUR I. MOULTON,
One of Solicitors for Plaintiffs.

Filed July 27, 1925. G. H. Marsh, Clerk. [47]

AND AFTERWARDS, to wit, on the 29th day of July, 1925, there was duly filed in said court a praecipe of plaintiff for transcript, in words and figures as follows, to wit: [48]

In the District Court of the United States for the District of Oregon.

MABEL SIMPSON et al.
vs.
OREGON-AMERICAN LUMBER COMPANY.

PRAECIPE FOR TRANSCRIPT OF RECORD
(PLAINTIFF.)

To G. H. Marsh, Clerk United States District Court for the District of Oregon.

Please include in the transcript which you have been requested to prepare for the defendants in this cause in addition to the record designated by them, the

Original complaint which was contained in the transcript on removal in the said court.

The motion to strike out parts of that complaint.

The order on said motion, and

The opinion of Judge Wolverton on said motion.

A. I. MOULTON,
WM. P. LORD,
Attorneys for Plaintiff.

Filed July 29, 1925. G. H. Marsh, Clerk. [49]

AND, to wit, on the 25th day of July, 1925, there was duly filed in said court a bill of exceptions, in words and figures as follows, to wit: [50]

In the District Court of the United States, for the District of Oregon.

MABEL SIMPSON and WAYNE DEAN SIMPSON, EARL SIMPSON and JOYCE SIMPSON, Minors, by MABEL SIMPSON, Their Guardian ad Litem,

Plaintiffs,

vs.

OREGON-AMERICAN LUMBER COMPANY, a Corporation,

Defendant.

BILL OF EXCEPTIONS.

This cause came on for hearing before the Hon. Robert S. Bean, Judge of the above-entitled court. Plaintiffs were present in person and by their attorneys, William P. Lord and Arthur I. Moulton, and the defendant was present in court through its attorneys, McCamant & Thompson and Ralph H. King. A jury was duly impaneled and sworn, when the following proceedings were had, to wit: [50½]

In the District Court of the United States for the District of Oregon.

MABEL SIMPSON and WAYNE DEAN SIMPSON and JOYCE SIMPSON, Minors, by MABEL SIMPSON, Their Guardian ad Litem,

Plaintiffs,

vs.

OREGON-AMERICAN LUMBER COMPANY, a Corporation,

Defendant.

BE IT REMEMBERED that the above-entitled case came on to be heard before the Honorable Robert S. Bean, Judge of the above-entitled court at the hour of ten o'clock A. M. on Thursday, the 11th day of June, 1925, the plaintiffs being represented by Mr. Arthur I. Moulton, their attorney, and defendant being represented by Mr. Ralph King and Mr. C. E. Illidge, its attorneys,

WHEREUPON the following proceedings were had: [51]

In the District Court of the United States, for the District of Oregon.

MABEL SIMPSON and WAYNE DEAN SIMPSON and JOYCE SIMPSON, Minors, by MABEL SIMPSON, Their Guardian ad Litem,

Plaintiffs,

vs.

OREGON-AMERICAN LUMBER COMPANY, a Corporation,

Defendant.

Portland, Oregon, Thursday, June 11, 1925, 10 A. M.

TESTIMONY OF FRED L. NYE, FOR PLAINTIFF.

FRED L. NYE, a witness called by the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. MOULTON.)

Where do you live, Mr. Nye?

A. I live at—at present I live at American Falls, Idaho.

Q. What is your occupation?

A. Why, jack-of-all trades; mostly farming.

Q. Did you ever live at Vernonia, Oregon?

A. I did.

Q. When did you live there?

A. I lived there in 1922 and '23.

Q. You lived there in 1922 and '23?

A. Yes, sir.

Q. Were you there in the fall of 1924?

A. I was—no, I was not.

Q. What were you doing there in the fall of 1924? The fall of 1924, was last fall, Mr. Nye.

A. Yes, sir.

Q. Were you there then?

A. I wasn't there then.

Q. When did you leave there?

A. I left there in the spring of 1924.

Q. Were you there on September 11th—in Vernonia on September 11th, 1924? A. I was.

Q. What were you doing there then?

(Testimony of Fred L. Nye.)

A. Working in the sawmill.

Q. What was the mill you were working in?

A. Oregon-American.

Q. Oregon-American Lumber Company's mill?

A. Yes.

Q. How long did you work there? [53—1]

A. Worked there eight months. Commenced when the mill started, about the 9th of July.

Q. And what were you doing from the time you started to work until the 11th of September?

A. I was edger tailer in the mill.

Q. What were the duties of your position?

A. I had to transfer the timbers and pull the edgings off the timbers that came through.

Q. Do you know whether you started on this edger that you were working on at the time the mill started, and when the edger was first put in operation?

A. I didn't start with this particular edger; other one right beside it.

Q. How long did you work on the one right beside it?

A. Oh, about three weeks if I remember right.

Q. How long did you work on this one before the day that Clyde Simpson was hurt there?

A. Well, I worked—after I left this other edger, worked there two or three weeks—

Q. And you worked there the rest of the time up to September 11th, on the same one Clyde Simpson was working on? A. Yes.

Q. Will you try to explain to the jury; describe

(Testimony of Fred L. Nye.)

that machine, the edger on which you were working, making it as clear to them as you can how the machine was constructed; the one on which Clyde Simpson was working when he got hurt.

A. Well, they have line-up rolls behind the edger where he was working.

Q. I will interrupt you from time to time, so as to get [54—2] it clear. These line-up rolls, how long a set of rolls were they?

A. Oh, they were about twenty or twenty-five feet long.

Q. Were they live rolls or dead rolls?

COURT.—You mean the rolls were twenty-five feet long?

A. Where they extended back that far.

COURT.—How long was the roll itself?

A. The set of rolls.

COURT.—How long were the rolls?

A. Oh, there were several rows of rolls in there.

Q. I think you don't understand the Court's question.

JUROR.—Was the roll four feet—four—five—three? A. They were three-foot live rolls there.

Q. How long is the set from the edger back to where the man who lines up for the edger stands?

A. About twenty-five feet, they extend.

Q. Are these rolls, that series of rolls, are they live rolls or dead rolls?

A. Well, part of them is dead rolls, and when he steps and raises up another set of rolls it drives the timber into the edger.

(Testimony of Fred L. Nye.)

Q. These rolls that raise up though are they driver rolls or are they rolls which are dead?

A. They are driven rolls that they are raised up.

Q. How are they operated? Where is the trigger that sets them in operation?

A. It is underneath there and he steps on the pedal.

Q. Suppose that set of rolls referred to leading there is this table and the saw at the opposite end of it, tell us about [55—3] where those pedals are that are used by the men lining at the edger; where are they? Suppose this was the end of the rolls here?

A. In the first place they were direct under the timber that was lined up; but they changed them and I don't remember—they changed them one side or the other, I don't remember which.

COURT.—Suppose that table was—the rolls were on that table; how far apart would they be?

A. About four foot.

COURT.—How long was the table upon which they rested—the platform—whatever you call it?

A. Well, twenty-five feet long.

COURT.—Twenty-five feet long?

A. They didn't have to be the full length of the timber.

COURT.—About six or seven rolls on the table were there?

A. Yes, something like that.

Q. Now, alongside these rolls to the right of the station where the man who was lining up to the

(Testimony of Fred L. Nye.)

feeders—what do you call that man—what was Simpson—what was the name of his job?

A. Line-up man.

Q. Now, to the right of where the line-up man stood, was there another set of rolls?

A. To the right of him, yes.

Q. What were those rolls used for?

A. They were chains to run the timber down to the rolls.

Q. Conveyer chains, were they? A. Yes.

Q. How did the lumber come into the mill? Just describe [56—4] how it comes up to the edger—what brought it there?

A. Why a set of rolls brought the lumber up to the edger.

Q. No, suppose here is this liner-up standing here, and here is this chain coming along. Where does the lumber come to the liner-up from?

A. Comes from the head rig. A set of rolls brings down here to this chain—to the other chain about four foot; they run the lumber down—

COURT.—Have him first describe the table upon which the rolls are located, and the location of the saw.

Q. The lumber comes riding down on a set of rolls, doesn't it? A. Yes, from the head rig.

Q. Just from up there in the mill? A. Yes.

Q. And when it comes alongside or parallel these rolls that are in front of the saw of the edger, it rests on these rolls? A. Yes.

Q. That it came in on. There are a set of little

(Testimony of Fred L. Nye.)

chains which are used to slide it over from the rolls it comes in on, on to these rolls that lead up to the edger? A. Yes.

Q. How are those chains—who operates those?

A. Who operates those rolls?

Q. The chains which bring the lumber off the conveyor-rolls? A. The line-up man.

Q. What kind of lever or trigger device does he use to move a board off these rolls which it comes in over on to the edger-rolls? A. Foot pedal.

Q. Where is it located?

A. Just barely behind the edger. [57—5]

Q. So if the table were the group of edger-rolls and down where the gentleman is sitting down there were the edger itself, where is the pedal? Where would I find the pedal here in the floor—over here or where? Just come down here and show us where these pedals are.

A. These were the rolls around the edger. Just to one side of the timber, in the first place; I don't remember which; they were directly under the timber.

Q. In the first place?

A. He cut them off; then moved them from one side to the other; they were right close enough.

Q. Where were they when this boy was hurt?

A. Right straight in line with the timber.

Q. How many pedals were *they?*

A. There were two.

Q. What were they used for? You have said one

(Testimony of Fred L. Nye.)

would move these boards over; what was the other used for?

A. The other one was to throw them back this way if he went too far; to line them up against the side, the solid side so they went straight through.

Q. Then here is a group of rolls, you have said about three foot long and six or seven of them, and some four feet apart. Now along this group of rolls how many rolls were there that were alive—were running?

A. Just one—just about four I think.

Q. And if he stepped on one of these pedals, what happened to that set of rolls?

Q. He had nothing to do with that live set of rolls. [58—6]

Q. Who operated those?

A. The edger-man did.

Q. The edger-man operated those?

A. Yes, he lifted them up; they were like this and raised up and raised the timber out and shoved it ahead.

Q. When they came up under the timber, they drove it forward?

A. They drove it forward, yes.

Q. What were the duties of this man who is referred to as the liner-up? What did he do in connection with it?

A. He just had to line up the timber.

COURT.—Was Simpson the liner-up?

A. He was the liner-up man.

Q. Let's get it straight. We will take a board in

(Testimony of Fred L. Nye.)

across through that edger; the board comes in on these conveyer-rolls, and comes along parallel with the edger-rolls; what does he do to it to get it over on the edger-rolls?

A. Why, he pulls one of those levers.

Q. He steps on one of those pedals? A. Yes.

Q. What does that do to the board?

A. That shoves it over another set of chains.

Q. Those chains that you refer to simply carry it over and lay on the edger-roll?

A. Set it over.

Q. What does the liner-up do to it then?

A. It generally comes too far, and if a straight piece of timber, he pushes over tight against the—takes hold of the end of it at the same time, and steps on the pedal and sets it over again.

Q. Was his duty to line up the edger table?

A. Yes.

Q. Who next does anything to it? [59—7]

A. The edger-man; that is when it is lined up he steps on his pedal and lifts up his rolls and shoves to the edger.

COURT.—Where is the edger-man standing?

A. He stands right—

COURT.—At the same end the liner-up did, or the other? A. No, right close to the edger.

JUROR.—Up to the other end of the table, then?

A. Yes.

COURT.—Where is the edger? (Indicates.)

Q. Now, at the other end of the edger from where

(Testimony of Fred L. Nye.)

this line-up stands—what is out there—at the other end of this set of rolls?

A. Where the liner-up man stands?

Q. Right straight across the rolls from him; you say it is twenty-five feet long. Twenty-five feet away, what is down there?

A. There is a space there.

Q. How wide is that space?

A. About fifteen feet wide.

Q. You think that space is fifteen feet wide between the rolls and the edger?

A. I am just judging; I never measured.

Q. Anyway there is an open space in there?

A. Yes.

Q. What comes next?

A. That is between—there is an upright post, iron post in there, you know.

Q. What has that post to do with it?

A. That is a brace in the roll.

Mr. MOULTON.—I may be able to diagram that. [60—8] I don't know whether I am going to be much help that way or not. Possibly I can help—can give an idea of it.

Q. Now if you will suppose, Mr. Nye, that this is a set of rolls, looking at them end-on—not an accurate perspective drawing—that this is the station of the liner-up in here, and that the set of rolls led down here. Then you say there is a space between that and the edger?

A. Between the edger and that—not very much.

(Testimony of Fred L. Nye.)

COURT.—You said about sixteen feet a moment ago.

A. I misunderstood. I thought you meant back here where the man stands.

Q. Now, down here between the edge of this set of rolls and the edger, how wide is that?

A. Between the edger and the rolls?

Q. Yes. A. Two feet and a half.

Q. Just a little space in there?

A. Just room for a man to walk through there.

A. I thought either I didn't remember right or you didn't remember right. Where does the edger-man stand? A. Stands right by the edger.

Q. He stands right there at the edger?

A. Yes.

Q. And what devices has he to set the machinery in operation?

A. Now, there is the saw, you know.

Q. This is the saw. This is supposed to be a straight-on view of the saw.

A. And the edger-man is standing right here?

Q. Standing right here. What does he use to operate the machinery—what kind of levers or pedals?

A. He has a couple of pedals right here. [61—9]

Q. What do those pedals do to the machinery?

A. Raises up his live set of rolls he has in there between these other rolls.

Q. There are certain rolls in under here?

A. In between.

(Testimony of Fred L. Nye.)

Q. They are in between these others that are alive, something like that? A. Yes, sir.

Q. And when he sets the pedal that lifts these live rolls up under a band that is lifting the dead rolls? A. Yes.

Q. Where does the board go then?

A. Conveys to the edger.

Q. Goes in this way? A. Yes.

Q. I have drawn a device consisting of a roll here and a roll over here; describe that device.

A. This is supposed to be the top of your edger; comes around like that; roll here; roll here; and that is the carriage up top; somewhere near the top; it is square on top.

Q. Are these rolls live rolls or dead rolls?

A. They are dead rolls, this one and that one.

Q. These rolls illustrated here, what kind of rolls are they?

A. Live rolls and conveyors; supposed to pull the lumber; that is supposed to hold it down.

Q. These rolls are corrugated rolls? A. Yes.

Q. How big are they? A. Which?

Q. The bottom rolls?

A. About five inches, five or six inches thick.

Q. And with this drum I have illustrated here you see, how long is that drum—how wide is the space the [62—10] lumber goes through into the edger, crosswise the drum.

A. Well, this side, it takes about thirty-six inches.

Q. So it is about thirty-six inches wide?

A. Yes.

(Testimony of Fred L. Nye.)

Q. And in that space of thirty-six inches, how many saws are there? A. I think five.

Q. How big are these saws?

A. Well, the way they are running them, there are four large ones; about twenty-four inches, I think.

Q. About twenty-four inches in diameter through the saws and they are circular saws, are they?

A. Yes.

Q. All driven by the same drum, are they?

A. Yes, these saws all run on the shaft; these rolls aren't as wide; there is three sets of these rolls; these are a set of long ones, thirty-six inches; another short one like that; another short one on the other side, with double edges; a man sawing on the other side.

Q. Now, then, there is a series of saws on this same shaft? A. Yes, sir.

Q. What happens to the board when driven in?

A. Sawed in dimensions.

Q. Are those saws stationary on the shaft or is there means by which it can be moved back and forth along the shaft?

A. Can be moved back and forth on the shaft; can saw any dimensions.

Q. They can set to saw different widths boards. How many pieces can the same piece of timber be sawed into at one operation there? [63—11]

A. That just depends on—

Q. There are saws enough to saw into how many different pieces?

(Testimony of Fred L. Nye.)

A. There would be—you can saw into six different pieces.

Q. Now, then, Mr. Nye, these rolls over here, are they stationary, these top rolls that you have said are dead rolls, or can they be swung up and down?

A. These top rolls?

Q. Yes.

A. They can be lifted up by steam lever or throttle he has there.

Q. The edger-man has a throttle?

A. Has a throttle; he raises these rolls up when he puts a timber in.

Q. Overhead is what in relation to the steam?

A. Steam-pipes.

Q. Over the top, what is up there, on each side? Is there a cylinder up there?

A. There is, yes.

Q. Where is the valve connected with that cylinder, do you know?

A. Right on top, right close to the top.

Q. What operates that valve? A. Steam does.

Q. Who has control of the valve and opens and closes it? A. The edger-man.

Q. What happens when he operates that valve? What happens to these rolls?

A. When he lifts up on it that throws the—when he lifts up on it that throws them open.

Q. That lifts these rolls up? A. Yes. [64—12]

Q. In other words they hinge up, possibly like that?

(Testimony of Fred L. Nye.)

A. It is hinged right in here; this top is square above it—square across. Make it square across the top.

Q. And these hinges are down like that?

A. Something.

Q. And they are hinged so these rolls can be raised up?

A. Hinged right in here; don't come clear to the top.

Q. Don't come clear to the top?

A. No, don't open to the top.

Q. Something more like that?

A. They are hinged right in here.

Q. Now, when he operates this steam valve how high can these rolls be lifted up above the live rolls below them? A. They raise about twelve inches.

Q. Now, this first roll that the lumber first strikes is a driver roll or corrugated roll, isn't it?

A. Yes.

Q. And when the lumber comes out of the machine, what kind of a roll is that?

A. They are driven rolls.

Q. Is it any different from the one on the other side?

A. Yes, it is different; it is a solid table there.

Q. No, this first roll comes here.

A. That is from the edger.

Q. This edger-roll, what kind of a roll is that?

A. That is corrugated also.

Q. Is that the same as the roll on the other side?

A. The same.

(Testimony of Fred L. Nye.)

Q. Is it driven? A. Yes.

Q. As the board runs through there in which direction do these two rolls move? Which way do they roll? [65—13]

A. They are moving forwards, towards you.

Q. So as to drive the board through the machine?

A. Yes.

Q. When the board that we have referred to a while ago that came in on the conveyor-rolls along here is shunted over on to these dead rolls, what does the edger-man do to it to cut it into pieces; what happens next?

A. He has the saws set. As soon as he sees the timber coming, he has his saws set, knows what to cut them; he sets his saws so far apart, just as far as according to the figures he is cutting.

Q. After he gets his saws set and the lumber is lined up and laying there, what does he do to it?

A. Why, he steps on his pedal and sends it into the edger.

Q. That lifts these live rolls on the foot-lever here and moves it up to this next live roll?

A. He lifts up his rolls; the edger steps on it until it catches hold the end of it and it goes on in.

Q. He operates this steam valve and raises this roll up and with these rolls, runs it in between them?

A. Yes.

Q. Then what does he do when it gets in there, the end of it?

A. He doesn't have anything to do then.

(Testimony of Fred L. Nye.)

Q. So far you have just lifted this roll high up in the air.

A. They both raise at the same time, these here.

Q. Does he lower this roll on the board?

A. It lowers itself. He just raises up and it goes down.

Q. Then this rests on the board? A. Yes.

Q. And binds it down against this live roll?

A. Yes.

Q. Where does the board go then?

A. The board is supposed to go on through; generally does. [66—14]

Q. And what happens to it? Comes on through out here? A. Sawed in different dimensions.

Q. According to the set of the saws? A. Yes.

Q. Where was your station?

A. My station was way back in the end here between—there was one roll out and space enough for me to stand in there.

Q. How far were you from the edger?

A. I was about thirty feet from the edger.

Q. What was your task back there where you stood?

A. Push the edgings off where the edger tailer—

Q. In other words, you were to get the lumber away from there? A. Yes.

Q. After it was cut. Of these three men, the liner-up down here, the edger-man and you down here—the tailer edger-man, who was superior; who was in charge of the machine there?

(Testimony of Fred L. Nye.)

Mr. KING.—I object. That has nothing to do with the allegations of this case.

COURT.—I think it is proper to show the circumstances; no claim, I believe.

Mr. KING.—If it is just explanatory. You don't claim anything else for it, do you?

Mr. MOULTON.—Well, I have a position in this case which I have already urged but which is not here; for the present I reserve my right to apply it to whatever it may be applicable, but I still think it is important as part of the situation here.

Mr. KING.—For the purpose of the record, I would like to make an objection to that question on the [67—15] ground it is immaterial and irrelevant and not pertinent to any issue in this case, and may I save an exception to your Honor's ruling.

COURT.—Very well. I think it is competent to describe the situation there.

Q. Will you just answer that; who was the man in charge out there.

Mr. KING.—Same objection.

A. The man in charge of the machine is the superior officer.

Q. What is his title? A. Edger-man.

Q. Who directs and controls the liner-up on one side, and the tailer edger on the other?

A. He is supposed to direct both men, the liner-up man and the tailer.

Mr. KING.—It is understood my objection goes to all this.

COURT.—Yes, I understand.

(Testimony of Fred L. Nye.)

Q. Now, you had been working, had you, right straight along for several weeks?

A. Several weeks.

Q. In that period of time, Mr. Nye, that you had been working there at this machine and before Simpson was hurt, how had this machine been working in respect to the readiness with which these rolls responded to the valves—raised up and came down?

Mr. KING.—Object to the form of the question as leading, and also object as not competent evidence for any issue in this case.

COURT.—I understand the charge of negligence here is that the apparatus was out of order, the valves were out of order. [68—16]

Mr. KING.—Object to the form of the question.

Q. Will you just answer, Mr. Nye, in regard to that. A. It was out of order.

COURT.—State how it operated.

Mr. KING.—Move to strike out his conclusion.

COURT.—Not your opinion of it.

Q. Tell how it responded and what it did.

A. When he was handling that lever, why it didn't press down on the timber hard enough; it didn't give the right pressure on the timber we were sawing.

Q. Would the boards come through without stopping—come right straight through?

A. Not always; sometimes they did, and sometimes they didn't.

Q. How often did they buckle and stop?

A. Pretty often at that time.

(Testimony of Fred L. Nye.)

Q. Now do you know just how near he could close the two together at that time?

A. Couldn't come closer than two inches, that is without pressure.

Q. Couldn't come without pressure closer than two inches? A. No.

Q. What about the manner in which the rolls close on a thin board, boards an inch thick?

A. Didn't have much pressure on an inch thick.

Q. How did it work in sawing boards an inch thick? What experience did you have with it here in regard to whether it would take hold of them firmly and drive them through?

A. The board stopped and we had to raise it up and whack [69—17] down on it with the rolls.

Q. How often did it stop and stick that way?

A. Three or four times in half a day.

Q. How long did that continue, these rolls bucking that way?

A. Oh, well, it continued for a couple of weeks.

Q. Was that condition still existing when Simpson was hurt? A. It was.

Q. Do you know whether a report had been made to the mill foreman? Do you know?

A. No, I don't. I don't know that.

Q. Now, then, will you tell the jury what you were doing and just what happened when Simpson was hurt?

A. They were sawing an inch board, an inch cant they call them; call them all cants; and they lined it

(Testimony of Fred L. Nye.)

up straight and it went through there all but one board, and it didn't.

COURT.—What?

A. It went through, all but one board. They sawed it in three pieces, and they all went through but one.

Q. Let's get at it, Mr. Nye. How does it come that one board was longer than another in that situation?

A. It wasn't longer, but one board stopped and the other two went on.

Q. There were three pieces sawed. One board was sawed into three pieces, and two of them came on through? A. Yes, and the other one stayed.

Q. The other one stopped? A. Yes.

Q. Where did it get before it stopped?

A. It got to the first roll on the edger and stopped.

Q. Did it get clear past the saw? [70—17½]

A. Between the saws.

Q. It was in between the saws?

A. Stopped in between the saws.

Q. What happened then when it stopped?

A. The rolls were raised and they looked to see what was in there.

Q. Who did that?

A. The operator, the edger-man.

Q. Where were you standing?

A. I was standing in my position back there between the rolls.

Q. What were you looking at?

A. Looking right at the edger.

(Testimony of Fred L. Nye.)

Q. What was the reason you would be looking right at the edger?

A. I was watching—I had to be watching the edger all the time.

Q. What happened when these rolls were raised?

A. The board went out of there.

Q. Just describe the force and violence with which it went out, and which way it went out.

A. Went straight backward, as near as I could tell went straight back from the edger.

Q. How much of that board yet remained between the saws when it went out? A. None of it.

Q. I mean before it went out, when it stopped?

A. How much of it?

Q. Yes. A. The whole board was there.

Q. I just want you to say how far forward it had gotten before it reversed and went back?

A. Just between the saws. [71—18]

Q. In between the saws there? A. Yes.

Q. Where did it come from there; assume this was the board.

A. Revolved in this way. This is supposed to be the edger and line-up here. The saws revolve backwards, you know, sawing lumber.

Q. This saw is driving against the board as it comes through there?

A. Yes, and the rolls push it that way.

Q. The roll is revolving in one direction, and the saw in another? A. Yes.

Q. Where did the board go from the time it stopped there?

(Testimony of Fred L. Nye.)

A. When he raised the rolls in about a second, it moved over like that. When it moved one side, it went out the other.

Q. Which way did it go?

A. Straight back. I saw Simpson jump up in the air.

Q. Was any call or warning given?

A. There wasn't.

Q. Was there time for any warning to be given after it stopped?

A. Not after he raised the rolls. Wasn't no time to give a warning.

Q. How long was it stopped when the operator raised the rolls?

A. Didn't stop I couldn't say more than a second.

Q. How long after he raised the rolls before the board went back?

A. They went just about a second.

Q. With what speed or force did it go.

A. It went with all the force anything could give.

Q. Can you give the jury any idea whether it just rolled back?

A. No, it went out of there like a bullet out of a rifle. [72—19]

Q. Could you see it?

A. No, I couldn't see it. I see the man jump in the air, and didn't know whether he was hit or not until I walked up that way, and everybody stopped generally.

Q. Where did the board go? Where was the board and Simpson when you got there?

(Testimony of Fred L. Nye.)

A. I didn't go clear back to him. They all jumped in there and picked him up, and they were carrying him out so I never saw where the board went to.

Q. You didn't see where the board did lay back there? A. No, I didn't.

Q. Could you tell from where you stood whether the board hit Simpson? A. I could.

Q. And it hit him?

A. I know it hit him because it knocked him out; went right in his direction.

Q. Did you go back there to see whether anything there to indicate he had been hit?

A. No, I didn't. I could see all I wanted to see from where I was at. I saw he was hurt, and it made me sick, and I didn't go back there.

Q. You didn't go back there to him because others were there? A. Yes.

Q. Now, in regard to that steam cylinder that operates that, do you know what was the reason these valves wouldn't close those rolls down?

A. They wasn't adjusted right. That is all I know about it. [73—20]

Cross-examination.

(Questions by Mr. KING.)

I want to get some of these matters clear here. I don't want to put you in the light of being misunderstood before the jury. About the last answer that you gave, you say the valves weren't adjusted right. That is just your own notion, isn't it?

(Testimony of Fred L. Nye.)

A. That is what everybody said. I saw them working on them afterwards.

Q. What I want to get at: You are just like any of the rest of us, you were told about the condition of the valves, and that is the basis on which you draw your conclusions that they were not adjusted right. Is that true? A. Yes, sir.

Mr. KING.—If your Honor please, at this time I move to strike out the testimony of the witness with respect to the condition of the valves from the record.

COURT.—It will be eliminated.

A. I couldn't set valves myself, so I couldn't—

COURT.—You tell how they operated, and the jury will say whether adjusted right or not.

Q. Now, do you remember the date Mr. Nye, when that sawmill commenced operation?

A. The ninth day of July.

Q. How long had you been working there at that time? A. When it started operation?

Q. Yes. A. Hadn't worked there before.

[74—21]

Q. That was the first time you went to work there? A. Yes, sir.

Q. That was all new machinery there wasn't it?

A. It was.

Q. Had you had previous experience in lumber mills?

A. I had.

Q. Where was the last position you held; what

(Testimony of Fred L. Nye.)

place was that prior to coming to Vernonia in the sawmill? A. I worked at St. Helens.

Q. What lumber company was that?

A. That is the McCormick Mill.

Q. The McCormick Mill there at St. Helens?

A. Yes, large mill.

Q. What year were you there at St. Helens? What year was that? A. That was in '22 and '23.

Q. You were there two years?

A. A year and a half part of '23.

Q. Did you farm before that? A. I did.

Q. How many years did you farm before that?

A. Well, the main part of my life; sawmilled a little.

Q. So your experience in sawmills was limited to the McCormick Mill at St. Helens, is that right?

A. Before I went there, yes.

Q. You had never worked in any other sawmill besides McCormick's and the East Oregon, is that right?

A. Yes, small sawmills; I understand the principle of it.

Q. What position did you have in the McCormick mill?

A. I was working at the resaw, they call it.

Q. Resaw?

A. Line up, resaw yes, and spot it on a trimmer. [75—22]

Q. When you first came to Vernonia, you say that was July 9, 1924, is that right? A. Yes, sir.

(Testimony of Fred L. Nye.)

Q. What work did you start on there—what kind of a job?

A. Started working on a tailer edger, on the pony-edger.

Q. Pony-edger. That brings to my mind the question: How many edgers were there there in the East Oregon Mill or the Oregon American Mill?

A. There were two large double edgers and a pony-edger.

Q. Three edgers? A. Yes.

Q. And as I understand, you call these large double edgers; really were big edgers on one side and smaller edger on the other, is that right?

A. Small saws; they edge from the gang-saws.

Q. So there were three edgers there altogether?

A. Yes.

Q. Now, how long did you work as tailer off?

A. Edger tailer?

Q. Edger tailer; how long did you work as edger tailer on the pony-edger?

A. Two or three weeks; I can't say for sure.

Q. About two or three weeks?

A. Something like that.

Q. You would say practically up to the end of July; July 9th, up to about August 1st, you worked there. What did you do after August 1st when you ceased to work as pony-edger?

A. I worked on this edger until I quit the mill.

Q. When did you quit the mill?

A. Quit the mill the middle of March.

Q. The middle of March this year?

(Testimony of Fred L. Nye.)

A. This year. [76—23]

Q. And you worked on the big edger then, from August 1st to the middle of March this year?

A. Yes.

Q. Is that right? A. Yes.

Q. Who was edgerman on the big edger?

A. I don't know what his surname was, his given name was Pete.

Q. Pete Matesco?

A. I think so, that sounds familiar.

Q. He was working there at the time of this accident, was he? A. He was.

Q. He was the edger-man there, was he?

A. He was.

Q. You were tailer edger-man, and Pete Matesco was edger-man, and Simpson was the man that was line-up man for the edger, is that right?

A. That is right.

Q. At the time of the accident. Now did you ever make any complaint about the edger to anyone?

A. I never did, no, it wasn't any of my affairs.

Q. Mr. Nye, I hand you a photograph and ask you to look at that and tell me what it is, if you know?

A. That is a picture of the rolls coming down from the head rig, a picture of the edger, the timbers lined up.

Q. Is that the edger that you have been talking about? A. Yes.

Q. You recognize that?

A. I do, as plain as can be.

(Testimony of Fred L. Nye.)

Q. That picture looks accurate does it?

A. It is accurate.

Q. Do you see anything, Mr. Nye, about that picture that is different in any way from the conditions as you recall [77—24] them at the time of the accident to Mr. Simpson?

A. I can't remember whether they changed those pedals here before he was hurt, or after.

Q. You can't be certain as to that?

A. I know they cut them off but what time they did I don't know; they cut them off before he was hurt.

Q. They cut them off, you say, before he was hurt?

A. Yes, I remember him telling me he was going to cut them off.

Q. As to whether or not they were changed in any other way you don't recall at the present time?

A. I don't recall anything else.

Q. You wouldn't say that they were, or weren't?

A. No, I wouldn't.

Q. Now with these remarks which you have just made about the picture, is the picture otherwise just the same?

A. Yes, as near as I can remember.

Offered in evidence and marked Defendant's Exhibit "A."

Q. Now Mr. Nye, in order that we can make this a little clearer, I am going to ask you to point out on this picture where Mr. Simpson was standing in his work, if you will. This is not a very large

(Testimony of Fred L. Nye.)

picture, but I think it will greatly clear up the situation. A. Very plain.

Q. Just put a mark on the picture where Simpson was standing. Mark it "S." In order to make it clear, will you put an "S" where Mr. Simpson would be standing while lining up a piece on the roll? (Witness does so.) [78—25]

COURT.—Is that where you say he was standing when lining up?

A. When a man was lining up was standing—I thought you said—I misunderstood you.

COURT.—Mark it where he would be standing.

A. Lining up he would be standing here. By this pedal, right there is where he would be standing. Put his foot on there; standing there and taking hold of the timber.

Q. Now you have marked this, the record will show, but not very plain. Will you please point your finger to the point where you marked the "S" where Mr. Simpson was standing when lining up a timber on the roll. (Witness does so.) Now will you point out on the picture these conveyor-rolls that the timber came down on?

A. From the head rig?

Q. Yes; where is the head rig?

A. Back this way.

Q. Now the timber is coming down on these rolls?

A. Right down there; has a bumper there.

Q. That stops it there? A. Stops it there.

Q. Who operates these chains to move it over on the edger-roll? A. The line-up man.

(Testimony of Fred L. Nye.)

Q. That would be Mr. Simpson?

A. Yes, with the pedal here.

Q. Press with the pedal?

A. I thought two pedals there, looks something like that; one of them moves it over this way, the other moves it back that way if it happens to move too far, so he can reverse the chains back and forth. [79—26]

Q. I suppose the timber on the picture is a good deal thicker than the one that was on the roll at the time? A. Only one inch thick, that was.

Q. How wide was it?

A. About thirty some inches wide.

Q. And what were they cutting out of that timber thirty inches wide and one inch thick?

A. Cutting boards out of it, one inch boards.

Q. I mean how wide were they?

A. I don't know just how wide the inch cant was. I know this board over here was a six or eight inch board that left, in size.

Q. Were you led to believe the edger-man was setting the saws so as to cut boards six by one out of that cant or slab that came over one inch thick?

A. I think two was wider than that. I thought this was a narrower one.

Q. The edger stands up here and sets his saws, when he sees a piece of timber in front of him, to cut what he thinks will take the most lumber out of it?

A. He cuts to order, he has his orders. Up here is a blackboard with figures on it. There is a roll

(Testimony of Fred L. Nye.)
in there; you can't hardly see it, that raises up, and they are running all the time. They put the lumber up there.

Q. They are down in here?

A. You can't see them hardly.

Q. Now, there is one point I didn't get clear. I tried to pay attention. How long did you say this piece of lumber was that was coming through the edger? [80—27]

A. I don't believe I said.

Q. Maybe you didn't. I thought you didn't say. I thought I might not have paid attention.

A. No, I was to tell the length of the table. Nobody asked that question.

Q. How long would you say that was?

A. About thirty foot; it wasn't long enough for me to get hold of it; it couldn't have been that long.

Q. You couldn't reach it?

A. No, I couldn't reach it.

Q. You were standing thirty feet back from that edger?

A. Yes, back here, and pretty hard to get out, about three foot deep.

Q. Mr. Nye, you spoke of the edger on one side being up three feet, or thirty-six inches, this big side edger. Now there are two little projections over here? A. Yes.

Q. Do you want the jury to understand that they run all parts of the edger at the same time, or do they run different parts at different times?

A. All these saws run on one shaft.

(Testimony of Fred L. Nye.)

Q. I know turning. Suppose this piece coming through here now. Would they also put another piece over here and have it go through?

A. At the same time, yes.

Q. Have it go through at the same time?

A. Yes.

Q. They were not doing that at the time Mr. Simpson was injured. Was just this one big slab going through?

A. Just this one inch board. [81—28]

Q. Just this big side edger was running at the time he was hurt? A. Just this one side.

Q. How far would you say it is back from this last dead roll here? How much space is there directly behind it? I understood you to say fifteen feet.

A. I think fifteen feet between the posts over there.

Q. Fifteen feet there; from this roll back this way, about how many feet?

A. Have a chain over here to take the timbers over the gang; lay behind this post; but it must be twenty feet in there.

Q. Twenty feet? A. Yes.

Q. Now, assuming that Mr. Simpson, the operator, had brought this piece of timber, this cant as you call it, I believe, brought it over from the conveyor-rolls by using this chain and had lined it up, got it even with the saw, what would Mr. Simpson have to do then?

(Testimony of Fred L. Nye.)

A. Lined it up for the saw—that is all he had to do.

Q. Now, would it have been possible then for Mr. Simpson to line up this thirty-foot piece—after he had lined up this thirty-foot piece—for him to have stepped right over in there?

A. I guess he could.

Q. How about stepping over to this side?

A. That could be.

Q. Could go either way? A. Yes.

JUROR.—Was there room, coming on these rolls, in which could swing the lumber in down there?

A. Whenever they sawed one, it would go down there. [82—29]

Q. That lumber coming down on these rolls there wouldn't go further than this? A. No.

Q. Wouldn't interfere with his standing here?

A. Sometimes it did they were pretty long. They come way back over, clear over this post. They hit that post sometimes.

Q. Assume the piece was only thirty foot long, it wouldn't interfere with his standing there?

A. No.

Q. That is about what that is? A. Yes.

Q. If a piece is thirty feet long, as I say wouldn't be anything to prevent him standing over in there while the piece was being sawed?

A. No.

JUROR.—The way I understand the matter, he can stand there if he wants to.

A. I don't know. If any trouble a man don't

(Testimony of Fred L. Nye.)

stand down there. They tell me he is supposed to give a high sign there if trouble or danger. That is the way they always talked to me. I have lined myself. They have told me to get out of the way if anything dangerous. They aint supposed to kick back unless a knot or something like that.

Q. They do kick back, don't they?

A. That one did, anyway.

Q. You say when you—if you were standing here lining up this way, you would stand directly behind that piece while it went through the edger?

A. I wouldn't.

Q. You wouldn't? A. No.

Q. You would stand either to one side or the other would [83—30] you not?

A. That was danger enough.

Q. I mean you would stand to one side or the other? A. Yes.

Q. Now, I am going to hand you another picture, and ask you to examine that picture and look it over carefully and see if it correctly presents a view of that portion of the mill that this edger is, as far as you can tell, and as far as you can recollect, the way the conditions were at the time of the accident to Mr. Simpson.

A. No, there is a difference.

Q. What?

A. Some things been done different there.

COURT.—I didn't hear what you said.

A. I said there had been things changed there

(Testimony of Fred L. Nye.)

since he got hurt. Changed here, but none in this part of the mill.

Q. Not in the part of the mill where the edger was there?

A. No, nothing there that I can see.

Q. Was the general view of that particular mill the same, especially with respect to this edger?

A. Yes.

Offered in evidence and marked Defendant's Exhibit "B."

Q. Now look at this Defendant's Exhibit "B." This is the same edger we had another view of, in the other picture, isn't it?

A. I guess that is.

Q. This is the place where he would be over at the end of these rolls, wouldn't it, where it is coming out? Which side is that, coming in or going out?

A. This is where it comes in. There is a set where it [84—31] moves through, five saws you see, five handles there.

Q. He just moves these over and cuts what width he wants to?

A. He can set them over; sometimes they have to use these different rolls here.

JUROR.—We can't see that picture from here. Is that the edger-man standing here?

A. That is the man.

JUROR.—Is this edger any different from any other edger used in large sawmills?

A. Why it is some different, but on the same prin-

(Testimony of Fred L. Nye.)

ciple. Supposed to have—it works on the same principle; have pressure on the log so as to hold it down on these drawing rolls that draws the lumber through.

JUROR.—The one you have here I think is operated the same as all other large edgers. This man operating the saw at the time, did he have any long experience with saws of that kind, do you know?

A. I don't know how much experience; he had some experience. I figured he was a pretty good man.

Q. Now referring to Defendant's Exhibit "B," will you hold that up, please, so that some of the jurymen may see; and tell me whether the men shown in that picture are in front of the edger as the lumber goes to it to be sawed, or are they behind it? A. In front of it.

Q. They are in front of it?

A. As it comes to be sawed.

Q. Those levers that you speak of being set to saw the lumber in different widths, who sets them? [85—32]

A. The edger-man sets them.

Q. That is Pete Matesco?

A. That is him right there.

Q. You know Pete, do you? A. Yes.

Q. You know he had any experience as an edger-man? I understand one of the jurymen asked that question. A. I think he had.

COURT.—How long had he been at work there?

(Testimony of Fred L. Nye.)

A. He started when the mill did, the first day.

Q. Now, Mr. Nye, it is hard to judge distances by a picture. The top of that edger as you see it in the picture, about how far is that to the floor? About how many feet, as high as my head?

A. No, it wouldn't be that high. Wouldn't be high as your shoulder, hardly, as I can remember.

Q. Isn't it higher there than the head of this man standing alongside of it?

A. He is leaning over there, he isn't standing up there.

Q. Is Pete a short man?

A. Tall man, I should judge better than six foot. Six foot two, probably. But he is leaning way over there; you can't tell on the picture how tall he is.

Q. Just lets get it clear. Don't you think that was over five feet from the floor to the top of that edger? A. No, I don't.

COURT.—The top of it?

A. Because he could look right over the top of it.

Mr. KING.—From the floor up, your Honor, to the very top. Covering sticks up above there. [86—33]

A. That is covering in there.

Q. How high is the top of that covering in there?

A. From the floor?

Q. Yes, from the floor.

A. I don't think it is five feet.

Q. You don't?

A. No, I don't. I never measured it, so I don't know, just have to go on what I can remember.

(Testimony of Fred L. Nye.)

Q. Your best recollection is, that is five feet?

A. I don't think it is that high.

Q. About four and a half, you think? A. Yes.

JUROR.—Didn't you say you could look right over the top of it?

A. Yes, he could look right over, a man working there about five feet six, and it just comes to the top of their shoulder. I know that on the other side. It was the same all the way across.

Q. Now will you point out on this picture where you would be standing if you were working there at your position?

A. Well, I can't point out. Standing right there where that fellow is standing there.

Q. Clear over here on the other side?

A. Straight in line.

Q. Thirty feet back, is that right?

A. Thirty feet from the last roll. I don't know whether that is me.

Q. Suppose we mark there "N," how would that be, for Nye? A. Be all right.

Q. See that "N"? Is that correct? Is that where you [87—34] would be standing?

A. Yes.

Q. Mr. Nye, you have spoken of the saws inside the edgers. Were these saws set down in the floor, the lower edge of them? A. The saws?

Q. Yes. Are those sunken in the floor? I mean a round space scooped out for the lower part of the saw?

A. No, they wouldn't hardly come to the floor. Of

(Testimony of Fred L. Nye.)

course opening below that, the sawdust—comes centerways. The saws are centerways with that there, right across; the center of the saw is level with the center of that, nearly; just enough to give the pull on the level of that shaft in there.

Q. How much are those saws across in diameter? How far is it across one of them?

A. They would be about thirty-inch saws.

Q. Thirty inches. They are all the same diameter are they not?

A. Well, there is one—there is usually one smaller one. They had smaller saws to start with; use one smaller saw on the back side.

Q. That small saw couldn't be on the same shaft, could it?

A. Smaller in diameter; be just the same size.

Q. Wouldn't reach high enough; attach lower?

A. Saws the slab, small edge; hardly ever use it.

Q. You say these saws are thirty inches in diameter. What is there above the saw?

A. Above the saw?

Q. Yes.

A. They have a frame there with rollers on.

Q. How thick are those rolls, those dead rolls up above? [88—35] How thick are those through, how big diameter?

A. About eight inches.

Q. About eight inches; and then there is guards over these, over the saws, so nothing can fly out?

A. There is.

Q. How much higher than the dead rolls do these guards extend upwards?

(Testimony of Fred L. Nye.)

A. About sixteen or eighteen inches.

Q. And then above the guards, there is still some more covering up top?

A. Some steam-pipes up there.

Q. They are covered up, aren't they?

A. No, they are laying bare, steam-pipes and gas-pipes.

Q. Now, Mr. Nye, as I understand, this cant that was being sawed at the time of the injury to Mr. Simpson, was one inch? A. Was one inch.

Q. Thick. About thirty inches wide, and thirty feet long. Is that right? A. That is right.

Q. And was being sawed into three separate pieces at one operation as it came through this edger, came through the edger and went on through, being sawed into three pieces; here is where it comes on the rolls up here. You say you saw Mr. Simpson line that up, did you? A. Yes, sir.

Q. You were watching him at the time; is that right? A. I watched him, yes.

Q. Then he lined it up by raising up these rolls, did he? The sunken rolls here, the live ones? [89—36]

A. No, he had nothing to do with these rolls, these chains here, they held them up and held the lumber down.

Q. After the lumber was lined up, you say Pete raised up the live rolls to bring it to the edger here. Did you see him do that?

A. I couldn't see him step on the pedals there; they were at the side, but he shifted the edger; it went in the edger all right.

(Testimony of Fred L. Nye.)

Q. Were you watching him? A. Yes.

Q. How much could you see of Pete at that time?

A. I could see more than his head and shoulders.

Q. How much more could you see?

A. Four or five inches more.

Q. Around up here? A. Yes.

Q. You could see both hands, could you?

A. I could see his hand as he handled the lever.

Q. How high would he put his hand up? Just show about what position? A. Just like this.

Q. Just like this?

A. Don't take much strength to do it.

Q. It doesn't. A. No, a finger will do it.

Q. And he lifted it up?

A. Yes, just put the steam in.

Q. And when he lets go of it, the rolls come right down. Is that right? A. Yes.

Q. The rolls come down slowly, do they, or how do they come?

A. They come down fast. You give it release, you know.

Q. Have you had enough experience there that you could judge [90—37] the weight of these dead rolls, how many hundred pounds it would weigh, the roll on each side?

A. I don't think would weigh more than 200 pounds.

Q. Apiece? A. Apiece.

Q. That is your best judgment of them?

A. That is my best judgment.

Q. Now of course you never made any study of edgers? A. No.

(Testimony of Fred L. Nye.)

Q. They might weigh five hundred pounds, as far as you know?

A. I am sure they wouldn't weigh that.

Q. Aren't they solid?

A. No, I dont think they are.

Q. Anyway pretty heavy; you are sure they won't weigh that much? A. Yes, sir.

Q. You have never seen one of these valves apart? A. No, sir.

Q. Never saw the inside of it? A. No.

Q. When the lumber went in—the lumber is lined up, that piece Simpson put on there to be sawed; Pete Matesco brought up these rolls and brought it up to the edger, and then lifted up this dead roll and started off with the saw? A. Yes, sir.

Q. Then the dead roll was dropped on top of it, is that right? A. That is right.

Q. Then it started through and kept on going through and of course when it came out this other side that dead roll would be on top of it too, wouldn't it?

A. It would if pressed down hard enough.

Q. And came out on the other side and came clear out here; you say two of the three pieces stayed on the other side? [91—38]

A. They did.

Q. Then the third piece that they were cutting it into stopped, did it?

A. Just far enough so I couldn't get hold of it. I might have pulled it.

Q. You couldn't reach it? A. No.

(Testimony of Fred L. Nye.)

Q. You say it stopped? A. Yes.

Q. Did you yell at anybody when it stopped?

A. No.

Q. Did it come to a distinct stop? A. It did.

Q. Still, was it, for a second? A. Yes.

Q. Then you say Pete, who was standing here on this side, lifted up the dead roll and looked under there to see what was the matter? A. He did.

Q. Did the dead rolls both lift up in the air?

A. They did.

Q. After they both lifted up in the air and were up above here away from the piece, this third piece shot right back through here and went out, and went on over and struck Mr. Simpson? A. It did.

Q. You saw it hit him? A. I did.

Q. Now, when Pete Patesco lifted up the dead roll on the side where you were, how many inches did he lift it up? A. Lifted clear to the top.

Q. Lifted the full twelve-inch space you said?

A. Yes, sir.

Q. Did both of the dead rolls raise up and lower at the same time? The same lever makes them both raise up and both fall? A. They do.

Q. It takes steam. It takes the letting in of steam to [92—39] raise them up? A. Yes.

Q. When you let go the lever they drop; the steam comes out? A. Yes.

Q. Now, while this piece was going through the edger, the one that was in the edger at the time of the accident to Mr. Simpson, you didn't have anything to do at that time, did you?

(Testimony of Fred L. Nye.)

A. When it was going through the edger?

Q. Yes. You wouldn't have any duties then, would you? A. No.

Q. It is only after the piece has arrived on the other side that you have to do anything taking it away, is that right?

A. As soon as it comes down to me. I wasn't supposed to go to the tables.

Q. I don't intend to criticize you at all. I was just asking for information. I wanted to know. I want to know about operating the edger. I want to know while the edger is at work, the piece coming through, do you have anything to do at that particular time? A. I do, sometimes.

Q. But on this particular occasion you didn't, is that right? A. I didn't, no.

Q. Do you remember what piece was sawed just ahead of this one? A. No.

Q. Whatever that was, you had put that away, had you? A. Yes.

Q. And now the table on which these pieces lay after they [93—40] came through the edger, that is on the same level as the rolls which feed the edger is on, some distance from the floor, isn't it?

A. Some distance—yes, the rolls that raise up, they are about the same level.

Q. Yes, that is what I mean. He raises up these live rolls and that carries to the edger and it goes through the edger and comes to the table on the rolls there; they come on the same level as the live rolls which raise up? A. Yes.

(Testimony of Fred L. Nye.)

Q. By "he" I refer to the edger, Pete Matesco?

A. Yes.

Q. How high was that table on the far side of the edger? How far did that come up to you; stand up and show the jury just how high that table came on you? A. Behind the edger?

Q. Yes, the table behind the edger.

A. (Indicating.) About this high on me, where I was standing.

Q. You would indicate then it came up just about even with your hips, is that right? A. Yes.

Q. To put that into feet, would you say that would be about three feet, would it, or a little over?

A. Be about three feet, wouldn't be over that.

Q. Now, did you have any lever to operate?

A. I did.

Q. When were you required to operate levers?

A. When I was dumping slabs; by the same lever rolls that come down from the head rigging.

Q. Now, every piece that came down from the head rig didn't go through onto the edger-rolls, did it? A. No. [94—41]

Q. A good many of them kept right on down the conveyor, is that right? To make it clear, here is the conveyor coming down from the head rigger?

A. Yes.

Q. Not every piece came off on to the rolls of the edger, did it? A. No.

Q. A good many of them were let down this back end, that is, you let them *do* on down. When they did that you dumped the slab down below that?

(Testimony of Fred L. Nye.)

A. Yes.

Q. And if they wanted to put a piece over the edger-rolls, if they thought the proper kind of a piece, they run up this bumper and Simpson would put over on the rolls, is that right? A. Yes.

JUROR.—All the pieces went through that edger except slabs? A. Yes, and timber.

Q. And in order to make it plainer, this was in a continuous stream coming down from the head rig; there would be a good many pieces that came from the saw carriage that would go on down to the gang-saw and would never come down on this conveyor chain at the side of the picture?

A. That is right.

Q. The larger pieces would come down to the gang-saw, wouldn't they?

A. Well grades, different grades.

Q. On the average it would take big pieces on the edger, wouldn't it? A. Yes, it would.

Q. Now, Mr. Nye, do you want the jury to understand—to make it clear: Suppose there wasn't any lumber there at [95—42] *at* all on the rolls leading to the edger; suppose they were entirely empty, and suppose Pete Matesco was not holding up this lever on the valve. Do you want the jury to understand that the dead roll would not come down and touch the live roll in front of the edger, and also the dead roll do the same thing in back of the edger?

A. I will have to ask you to repeat that.

Q. Suppose no lumber in there at all, in the

(Testimony of Fred L. Nye.)

edger machine; you want the jury to understand that this dead roll would be up in the air and not touching the live roll?

A. Yes, it would be up—it was that way so it would be up some space; bound to be a little.

Q. Why bound to be a little?

A. Because they couldn't saw anything less than one inch, wouldn't come clear together—half inch apart—it ought to be that way.

Q. What would hold it up in the air, what force would hold it up in the air if there was no steam on and no timber in there?

A. There wouldn't be no holding up in the air if didn't have no steam.

Q. That is what I said; it would rest right on the live roll down below, wouldn't it?

A. Rest down.

Q. Come clear down and touch the live roll, wouldn't it? A. It would.

JUROR.—You don't mean that, do you?

COURT.—What did you mean a short time ago when you said the dead roll would not come within two inches of the live roll? [96—43]

A. It wouldn't when the steam was on, when they are working it there.

COURT.—When the steam was on? A. Yes.

COURT.—What was the steam on for, to raise it or lower it?

A. The steam was there to raise or lower it.

COURT.—The steam was used all the time?

(Testimony of Fred L. Nye.)

A. Used all the time. I never saw it when wasn't steam there.

COURT.—I thought the way you testified that they left the steam in to raise the roll, raise it up, then shut the steam off and the rolls came down of their own weight.

A. A double valve, works up and down both.

Q. Always steam there?

A. Always steam there?

Q. Mr. Nye, that raises another question. I thought you said you had never seen the inside of one of these valves.

A. That has been explained to me.

Q. I mean, you don't know of your own knowledge what it does, do you? A. No.

Q. That is right?

A. That is right. I don't know, but been explained to me that way.

Q. Let me repeat my question. Supposing there is no timber coming through the edger so that the timber itself would not separate the rolls; there is no timber there; suppose the edger-man has let this throttle down; he is not holding [97—44] it up; wouldn't that dead roll touch the live roll in front of the edger?

A. I never seen it when it touched clear down.

Q. You have never seen it when it touched clear down? A. No.

Q. Did you ever look at it then? A. I have.

COURT.—How close would it come to the live roll?

(Testimony of Fred L. Nye.)

A. Well, it would be an inch and a half or two inches, as near as I can remember.

Q. Now, Mr. Nye, if it were an inch and a half or two inches it would not touch a one-inch piece of lumber at all, would it? Is that right?

A. Probably it would, chousing it up and down; they used to chouse it up and down, and bound to go through there you know.

Q. I will ask you, did it touch piece of timber that was going through, the piece of lumber that was going through at the time Mr. Simpson was hurt?

A. He had to give a couple of jerks, give it a jerk on this; do that, and it would pound down on it; pound it through, you know.

Q. You saw Pete Matesco you say give this lever a couple of jerks? A. Yes.

Q. You don't know why he did it?

A. Why, did it on all them that didn't go.

Q. After he got done giving it the couple of jerks, it then rested on the piece of lumber?

A. Not very solid, no.

Q. Not very hard? A. No. [98—45]

Q. Could you tell by looking at it thirty feet away, how hard it rested on the lumber?

A. I could tell if it had been any space between, it wouldn't have went.

Q. What?

A. If been any space it wouldn't have went, the lumber wouldn't have went through.

COURT.—What do you mean by space?

A. Space between the roller and the lumber.

(Testimony of Fred L. Nye.)

COURT.—You mean the lumber would not pass on through unless held down by the upper roller?

A. No, it wouldn't; that is right.

COURT.—If the upper roller was up two inches and it was a one-inch board they were sawing, it would not have gone through? Is that what I understand? A. Yes.

Q. Now, of course, you couldn't see the dead roll on the other side of the edger from you?

A. No, I couldn't see that roll.

Q. But at the time that the piece was coming out on your side of the edger, on the bearing off side of the edger, the dead roll was then resting on the piece of lumber, wasn't it?

A. It was, as near as I could see.

Q. Now, you say it was resting some; could you tell how hard it was resting?

A. No, only judging by the timber not all coming through.

Q. In other words, it is your conclusion from the fact that one-third of this slab of lumber didn't come through; [99—46] it is your conclusion that the rolls didn't rest hard enough on the piece of lumber. Is that right?

A. That is the way I figure.

Q. Well now, Mr. Nye, it rested hard enough on that lumber to cause it to come all the way through but a short part of the distance, didn't it?

A. Yes, it did.

COURT.—Do you understand that question?

(Testimony of Fred L. Nye.)

Did this piece of lumber that struck Mr. Simpson come through the second roller at all?

A. No, it didn't come through the second roller?

COURT.—I thought that is what you testified; but in your answer to counsel's question you implied that it did. He said two pieces went through, but the third one didn't.

Mr. KING.—He meant didn't come clear through.

A. You asked me if it went past the first roller.

Q. Lets go through it again, I want it straight. Now, the edger-man, Pete Matesco, raised up these live rolls? A. Yes.

Q. And it had this piece of lumber on it?

A. Yes.

Q. And you brought the piece of lumber up to this first live roll and the first dead roll, did you?

A. I did.

Q. Pete Matesco raised up the dead roll, did he?

A. He did.

Q. Sure he raised it up?

A. I don't know whether he raised it or not, it went in there.

Q. You didn't see him raise it then. What is your recollection of that, did he raise it? I understood [100—47] you to say a while ago he did raise it.

A. I said he did raise it, is what I said.

Q. Is that true? Did he raise it?

A. He did, as far as I can remember.

Q. Now, it came into the saw, didn't it?

A. It came into the saw.

(Testimony of Fred L. Nye.)

COURT.—And he let the roller down again, did he?

A. He let the roller down; always raises it for every piece of timber.

COURT.—And then lets it down again on the timber? A. Yes.

Q. So that timber started to go into the saw then, didn't it? A. Yes.

Q. That was being cut by two saws so it would make three pieces? A. Yes.

Q. And the pieces began to come out over this live roll on the other side, and between the live roll and the dead roll on the other side of the edger, this side you were on, is that right? A. Yes.

Q. All three of them went through, started?

A. All but one.

COURT.—He said two went through, the other didn't. A. Two went through.

Q. You mean two pieces stuck their nose out here, but one didn't?

A. All went through until got past this,—all went through until got past this roll here.

Q. Let's take the end of the timber; let's take the back end of the timber that is going into the saw; where was [101—48] the back end of the timber when it started in there over that last—where was it when the timber stopped and began to come back, the tail end of it?

A. The tail end of it, right there, between the saws.

Q. The tail end was in the saws?

(Testimony of Fred L. Nye.)

A. Yes, and two went in, the two pieces, and this other one stayed there.

Q. And kicked back?

A. And kicked back when he raised up the rolls.

Q. When he raised up the rolls? A. Yes.

COURT.—But the third piece, the one that struck Simpson, didn't it go over the second roll?

A. No, it didn't.

Q. Let's get that clear.

COURT.—That is what he said.

JUROR.—He has explained that five or six times. Two pieces went through and one stopped there and kicked back.

Q. I want to know where the back end was that stuck there.

A. Right in there.

Mr. KING.—Judge Bean, this back end never reached the saws.

COURT.—The one going toward the saws or away from the saws?

Mr. KING.—I call it the tail end, the last piece. The one that kicked back was in that position. Is that right? A. Yes.

COURT.—It had gone through the roller?

A. That is the way I understood the question.

COURT.—You have been testifying, as I understood, [102—49] you, that the third piece never went through the second roll at all, never went into the second roll.

JUROR.—All went through.

A. Let me explain that. The timber went

(Testimony of Fred L. Nye.)

through—all of it went through there, past this first roller; the two pieces went on and the other piece stayed between these two.

COURT.—The rear end of it.

A. The rear end of it, yes.

COURT.—And kicked back this way.

A. Yes.

JUROR.—The facts of the case are that the saw had to cut the full three pieces before the two could go on and one stay there; it certainly was cut, you say. A. Yes.

Mr. KING.—It was cut at the time it stopped?

A. It was.

Q. Clear cut? A. Yes.

Q. Now, let's get that straight. The slab had been clear cut at the time this one piece stopped. It was all cut into three pieces, is that right?

A. Yes, that is right.

Q. In some way or other the roll was raised and two pieces went out at your end of the edger, the other piece, after Matesco raised the roll, that went clear back in through there?

A. Came clear back through.

Q. Through this other roller, and went clear back out through the end. Is that right?

A. That is right.

COURT.—I understand now. I couldn't see how [103—50] the saw could throw it back if it had passed there.

Mr. KING.—I had some difficulty.

Q. Take this stick and assume that it was the

(Testimony of Fred L. Nye.)

width of that piece thirty feet long and thirty inches wide, and show where the piece was at the time the two pieces fell off and the other piece stopped; just shoved through; the machine was there, and shoved through.

A. Run just to the end of the saw.

Q. Started in here, in under these rolls here, and began to come through coming in between these two, came on through, came on through and got clear through the saw?

A. No, no. Not through the saw; to the edge of the saw.

Q. And then two pieces of it went on through these other rolls?

A. And that one stayed there.

Q. And after it stopped Pete Matesco raised this roll? A. And the rolls opened.

Q. And the third piece kind of swung to one side and kicked back clear through there. Is that right? A. That is right.

Q. I guess I don't get that. How far is it, Mr. Nye, between the dead roll on one side of the edger, right through the saws, you know, measuring right through the saws—how far is it to the dead roller on your side of the edger?

A. About three feet through there.

Q. About three feet. Three feet you say from here to here? A. Yes.

Q. Three feet from this roll to this roll?

A. Yes. [104—51]

(Testimony of Fred L. Nye.)

Q. And you say the saw in there was thirty inches? A. Yes.

Q. In diameter. Now Mr. Nye, directing your attention to this drawing, I will explain it. This represents the edger looking down on top of it, on the dead roll; that would be the dead roll on your side. A. Yes.

Q. This would be the dead roll on the side where Simpson was working? A. Yes.

Q. And here would be the dead rolls and mingled with the live rolls, you see, in front. Now here is the chain that brings the pieces of lumber over from the conveyor, that runs along there, and here are the chains that are running off in this direction to move the lumber back over against the pointers to line it up.

A. That is right.

Q. In other words, these chains are running that direction and these over here are always moving that direction, so if Mr. Simpson or the operator brings the piece of lumber off the conveyor and brings it over here and over right up to the right-hand side of the edger, he can still have this other chain and move back over against the pointers along there, can't he?

A. That is right.

Q. You say this piece of lumber went back so fast you couldn't see it?

A. Just saw a streak of it, couldn't see the shape of it, whether went in two or three pieces. I say you could just see a streak of it.

(Testimony of Fred L. Nye.)

Q. You could see it coming out of your side of the edger? [105—52] Couldn't you?

A. Yes.

Q. You saw it stop? A. Sure I saw it stop.

Q. Anything else ever cause a piece of lumber coming through the edger to stop?

A. Yes, I have seen large timbers stop.

Q. Not only one inch pieces stopped, were they?

A. No, not only one inch.

Q. Large pieces stop also?

A. Yes, they were stuck, they killed the power.

Q. Sometimes they killed the power?

A. That is the only reason then.

Q. Don't the larger pieces kick back sometimes when the saw strikes a twist or knot or a splinter comes in alongside the saw and causes it to heat and bind?

A. I never seen one kick back on account of being bound, though, with any force.

Q. Did you ever see any saw kick back because a splinter got down inside the edger and caused it to heat?

A. Have seen it get hot, couldn't go through.

Q. You never saw a piece kicked back that way?

A. That is right, I never did.

Q. In other words, when you worked for the McCormick people, did any pieces kick back?

A. Well, I didn't see them, but I heard about a couple.

Q. And the rolls there didn't touch either, did they?

(Testimony of Fred L. Nye.)

A. They were large timbers kicked back through, both large pieces.

Q. Did the rolls touch those large timbers?

A. They did. [106—53]

Q. What?

A. They did, but that was on account of a knot, or something.

Q. You say a knot in the piece that kicked back at the McCormick mill?

A. I didn't see it, he told me. He told me knots caused them to kick back because it would raise the roll and that would give the space.

Q. I didn't hear.

A. I say would raise the rolls in going in, and that gives a space, and they kick back.

Q. The knot would raise the rolls? A. Sure.

Q. Didn't that piece kick back before Pete Matesco raised the rolls? A. It did not.

Q. What? A. It did not.

Q. You are sure of that?

A. I am sure of that.

Q. This edger was the same general type of edger that was used in the McCormick mill?

A. No, different.

Q. What difference?

A. It was a little heavier.

Q. A little bigger edger? A. Yes.

Q. And heavier safeguards on it too, didn't it have?

A. It did, yes.

Q. It was heavier construction throughout?

(Testimony of Fred L. Nye.)

A. It was.

Q. Had much heavier roll on the top of the saw —dead rolls? A. Yes, sir.

Q. Eight inch dead rolls are pretty large dead rolls? A. Yes, sir.

Q. Just one other question that occurred to me. [107—54] Can you speak the name of any edger that never kicked back? A. No.

Q. What? A. No, I cannot.

Q. Well, now, Mr. Nye, there is one other question. I would like to ask you whether your sympathies are with Mrs. Simpson in this case.

Mr. MOULTON.—I object to that question.

Mr. KING.—I think I am entitled to show.

COURT.—No, not a question of sympathy; that wouldn't be competent.

Q. Were you subpoenaed to come here?

A. I was not.

Q. How far is it from here to American Falls?

A. I don't know just how many miles.

Q. Over six or seven hundred, isn't it?

A. Over seven hundred.

Redirect Examination.

(Questions by Mr. MOULTON.)

Mr. Nye, how often had the boards thrown out of that edger while you were working there?

Mr. KING.—Object to that as not material.

COURT.—You asked about other boards thrown out of there.

Exception saved.

(Testimony of Fred L. Nye.)

A. Four different times that I remember.

Q. When they did fly, did they always fly straight right along that line? A. They did not.

Mr. KING.—Same objection and exception. [108—55]

Q. To get an idea, if a man lined up there, if he stood over to one side or the other, would he be out of the path of these boards as they fly?

A. He wouldn't be entirely safe, no.

Q. How much space did they fly over when they did fly?

A. I have seen them go straight out to the head rig, pieces, just small pieces.

Q. What was your observation—Mr. King has spent some time on that—what was your observation as to the solidity with which these rolls rest down on pieces like one inch and an inch and a half pieces?

A. They don't set down solid into it, because they jar up and down on that, and they will get them to go unless its gets hot or something, and that didn't do any good.

Recross-examination.

(Questions by Mr. KING.)

Just another question. I think you covered that before, but there isn't rollers on all sides of this outer roller—there isn't rollers to the side, there isn't any rolls over here or isn't any rolls there is there?

A. Rollers there and rollers there.

(Testimony of Fred L. Nye.)

Q. Now, when this piece came back and struck Mr. Simpson, he was standing here where you marked "S" was he not?

A. As near as I could tell he was not.

Q. How did that piece come back? Just where did it come? A. Comes straight back.

Q. Straight back. A. As near as I could tell. [109—56]

Q. Now these other four pieces we referred to, just tell where they went.

A. I saw one go right across here, right across; these pieces fly right around here where a man has to stand in there when he is taking over these timbers.

Q. You have seen them do that? A. Yes.

Q. At the Oregon-American Mill there at Vernonia? A. Yes.

Q. You saw them do that? A. Small pieces.

Q. Pete Matesco was working there too, wasn't he? A. He was.

Q. He would see them too; he was edger-man?

A. He surely would.

Q. Who else saw them there, those four pieces?

A. The line-up man would see them. I have seen them dodge, duck down.

JUROR.—That wouldn't be possible only with small pieces.

A. Small pieces is what I said; just small pieces.

Q. Would you say a thirty-foot piece would fly like that?

(Testimony of Fred L. Nye.)

A. No, I wouldn't—small pieces, three or four foot long; slab broke off in the woods.

Q. Do you want the jury to understand this thirty-foot piece coming back through there would likely come anywhere but straight back over the rolls?

A. It could vary a little, that is if coming down its full length, and the saw cut it in a couple pieces; it might do that.

Q. The saw would cut it in a couple of pieces? [110—57]

A. It might do that, yes.

Q. Did you ever see that done?

A. I have seen that done.

Q. See that at the Oregon-American mill at Vernonia? A. I have.

Q. Pete Matesco was there at that time too?

A. Seen them line timber up that wasn't any good—

Q. Pete Masteco was there at the time the saw cut it in several pieces, was he?

A. I guess he was.

Q. He was running the edger then, was he?

A. I guess he was.

Q. He would have seen that too, wouldn't he?

A. Yes, he would.

Q. Who else would have seen it?

A. I don't know who else would have seen it.

Witness excused. [111—58]

TESTIMONY OF P. H. ENDNER, FOR PLAINTIFF.

P. H. ENDNER, a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. MOULTON.)

Where do you live, Mr. Endner?

A. Down at Railhead at present.

Q. Where is that?

A. That is on the Natron Cut-off.

Q. What is your occupation?

A. Mill superintendent.

Q. What mill are you working in now?

A. Wibel Lumber Company.

Q. What experience have you had in sawmills?

A. Most all there is.

Q. How long have you worked in sawmills?

A. Thirty-five years.

Q. What various measurements or capacities have you worked in?

A. Twenty thousand to three hundred thousand mill.

Q. What kind of work have you done in these mills?

A. Millwrighting, running edger, superintendent.

Q. How long have you been superintendent of mills? A. Last twenty years.

Q. How much has been as a millwright?

A. Millwright and superintendent, and generally works together.

(Testimony of P. H. Endner.)

Q. How much have you run gang-edgers?

A. Have to do that all the time when there is a edgerman off; the superintendent generally takes his place.

Q. Are you familiar with the various makes of gang-edgers [112—59] that are used on this coast? A. Yes.

Q. Do you know the Filer & Stovel edger?

A. Yes, sir.

Mr. MOULTON.—Do you concede this is a Filer & Stovel edger?

Mr. KING.—Yes.

Q. Now will you explain to the jury the mechanics of the valves that are used in such machines as the Filer & Stovel to lift the dead rolls.

A. Well, they are run by steam. There is a steam cylinder sets on the edger of the edger, on each side of the edger, and this pipe is a half inch pipe from below, runs up through a framework on the side of the edger. That feeds the cylinder. When this edgerman lifts the lever, it lifts the rolls; when he drops it that rests the bearing rolls on the lumber.

Q. Will you try to explain to the jury the mechanics of these valves on that cylinder, how the valves admit the steam and how it releases it, how it acts to raise these rolls up.

A. When he raises the rolls or lever it lets the steam in, and when he lowers the lever it lets the steam out—holds it.

Q. Does the steam come in or out from more than one end of that cylinder? A. The lower end.

(Testimony of P. H. Endner.)

Q. It comes in and out from the lower end?

A. Yes, sir.

Q. When the edger is in operation and the steam is on in a power plant of a mill, and the saws are running, if [113—60] the edger stands at rest, where do the rolls rest?

A. Well, they rest down.

Q. Do they rest solidly upon the driven rolls below them? A. No, sir.

Q. How close do they come?

A. That is according to how they set them. Right at inch stuff they might be—not within seven-eighths of an inch.

Q. Who controls that? A. The edger-man.

Q. How does he control it?

A. By a bolt inside the framework; when his top roll comes down it rests on this bolt and that bolt is put in there by nuts, jam nuts. If he wishes to lower the roll a little lower, if they are cutting lots of inch, he lowers that so that the roll fits down tight on that inch stuff.

Q. About these edgers, I wish you would explain to the jury the theory of their operation, why it is they have rolls that way on top and driven rolls on the bottom; what is the purpose and theory of that?

A. The lower rolls or corrugated rolls, some of them have spikes in them, called spike rolls, little thin spike teeth; they grab hold of the plank and the top one presses it down on the bottom roll so as to keep it in its place.

Q. If the edger is in any wise adjusted either by

(Testimony of P. H. Endner.)

valves or otherwise so these rolls won't come down with full force on the boards that are driven to them what is the result of the operation of the edger —what happens?

A. Well, lots happens sometimes. [114—61]

Q. Suppose you had a case where your steam won't release out or anything, any condition of these valves so that when the lever is released these rolls don't come down solidly on the board, but stay up a little.

A. The edger-man generally gets ready and puts his hand on the cant, holds the cant, and gives the lever a jerk; lots of times a little friction or kink gets in.

Mr. KING.—I can't hear.

A. Lots of times a little scale in that valve that plugs the little hole, and he releases it, and the second time he does that his cant goes on.

Q. Suppose his valves are in such a condition from some cause that the full weight of the rolls won't come down on the board?

Mr. KING.—I object to him assuming a fact not in evidence. I think it is purely speculative, and no foundation for it.

COURT.—Evidence the rolls would not come down.

Mr. KING.—No evidence about any condition of the valves.

COURT.—No, but he can ask why they didn't come down on that. He is an expert and can explain if he can the reason why they would not come down on the roll. Some defect of some kind.

(Testimony of P. H. Endner.)

Q. What would keep the rolls from coming down full force on the board? A. Valves out of order.

Q. What would be the matter with the valve that caused that condition? [115—62]

A. Well, either a piece of cylinder off the inside corrugation, that would plug this hole and keep this valve from working up and down.

Q. If a condition of this kind existed so the roll don't come down full force on the boards, what effect does it have with respect to the operation of the edger, what happens?

A. They generally go after the steam fitter.

COURT.—Suppose they undertook to operate and run the board through. A. They don't do it.

COURT.—Suppose they do.

Q. If they do, what would the board do?

A. Liable to tear the machine to pieces.

Q. What effect does it have on the liability of the edger to cause the board to kick back?

A. There is different ways for a board to kick back. Lots of times—the way you are talking—I can feed an edger by hand, feed that in through and still hold my roll down by hand, and press it until them valves do work. There is lots of time a man will come up there and if the valve refuse to work, we call the engineer. He takes care of the steam system, and he takes a wrench, and loosens that valve and tightens it again. The edger-man does that before he puts in another board.

Q. I don't think you get my question. What I am trying to get at is, if a board is put in and run through when the valve won't force the rolls

(Testimony of P. H. Endner.)

down with full force, what effect does that failure to come down with full force [116—63] on the board have upon the liability of the edger to throw the board back?

A. Well, if you run a board through, and what causes it to break, to fly back if the board is through the first roll at the head of the machine, lots of times a check in the board; the other two go by, and this one sticks, and that little piece that fails to still hangs to this piece there, if this roller is raised, release that pressure, it will come back; what you call fly back.

Q. What will it do if the roll comes down with full force? Will it fly back the same way if the roll comes down?

A. No, it will come on through, but that piece will break off and drop down into the conveyor.

Q. When these machines are in proper adjustment, such as the Filer & Stovel edger, and the valves working all right, and the machine properly operated, are they liable to kick back boards?

A. No, not very often.

Cross-examination.

(Questions by Mr. KING.)

Mr. Endner, you say you never saw an edger kick back?

A. Oh, yes. I didn't say that.

Q. What? A. I didn't say that.

Q. I mean that one that was properly kept.

A. At times, yes.

(Testimony of P. H. Endner.)

Q. I beg your pardon. Where did you say you operated a Filer & Stovel edger?

A. Southern Oregon. [117—64]

Q. What mill? A. Ballett Lumber Company.

Q. When was that?

A. That is seven or eight years ago.

Q. How long did you operate the edger there?

A. About an hour.

Q. About an hour?

A. Well, sometimes two hours. If the edger-man wanted to go for a drink or somewhere, I would have to fill in and take his place.

Q. That is all the experience you have had with a Filer & Stovel edger? A. Yes.

Q. You took the valves apart, of course?

A. Oh, no, no, I didn't say I did.

Q. Had you ever seen the insides of these valves?

A. No, no; never had any occasion to.

Q. You don't want the jury to understand, do you, that that is the condition of these valves then you are testifying to when you have never seen the inside of a valve.

A. Well, we are supposed to know what is in there, but not see it.

Q. Do you know what is in there?

A. Yes, I know.

Q. What is in there? A. Steam in there.

Q. How is the valve made?

A. Well, just made the same as a cylinder; just like setting one glass into another. [118—65]

Q. Is that the way the valve was made?

(Testimony of P. H. Endner.)

A. Yes.

Q. You are positive of that, are you? A. Yes.

Q. And the Filer & Stovel edger that you are talking about has a valve just like that?

A. They all do. All the same. All cylinders are the same.

Q. What is inside the smaller glass? What is in that? A. What is in?

Q. You say a valve is just like slipping a small glass inside of a big one.

A. Just like putting a valve in a pump to pump water with, sure.

Q. And you say that the valve of the Filer & Stovel edger is like slipping a cylinder in which would of course fit tight down inside of another cylindrical glass? A. Yes.

Q. What kind of grooves are on this inside cylinder?

A. There is a valve on the end of that that raises a plunger, and raises and lowers the steam.

Q. Goes up and down like that, that valve?

A. Yes.

Q. Did you ever see a Filer & Stovel edger with that kind of a valve? A. I never did.

Q. They are not equipped with any other kind of a valve?

A. Never seen any other kind of an edger that was equipped with any other valve.

Q. Mr. Endner, I hand you this and ask you to tell us what it is.

A. That is a valve stem, isn't it? Isn't this your valve stem? [119—66]

(Testimony of P. H. Endner.)

Q. I am asking you.

A. That is a valve stem, isn't it?

Q. I am asking you, Mr. Endner.

A. I am telling you that is your valve stem. This plays inside the cylinder.

Q. It plays inside?

A. Yes, when he lifts this valve to inject the steam, this goes up and down.

Q. You mean this piece inside here goes up and down? A. Yes.

Q. That is right, is it? A. Yes.

Q. That is a Filer & Stovel valve?

A. Well, I don't know.

Q. On the edger.

A. Well, I am taking your word for it.

Q. I am asking what it is? A. I don't know.

Q. Did you ever see one of these before?

A. No, sir.

Q. You say that is not a Filer & Stovel valve for the edger?

A. No, I couldn't tell whether it was or not; so many different kinds made so near alike. The Portland Machinery Company make one just like that. There is where your steam comes in, and here is where it goes out when it works.

Q. And that goes up and down? A. Yes.

Q. You are sure of that? A. Sure.

Q. You are sure that goes up and down?

A. Yes.

Q. Now, Mr. Endner, let's be fair with one an-

(Testimony of P. H. Endner.)

other. You never had one of these valves apart, did you? A. No, sir. [120—67]

Q. You don't know where the steam comes when it comes in or where it leaves from that valve?

A. We don't have nothing to do with that. That is the machinist's part. The machinist takes care of that.

Q. Now, let's take it one step farther. You say that an edger, if the valves are in proper condition, will never kick back. Is that right?

A. No, sir, it can't.

Q. It can't kick back?

A. No, sir, it is impossible.

Q. Well, now, how did you form that conclusion?

A. Well, if the rolls are down on the piece of board, there can't nothing kick back unless the edger lifts them rolls unbeknown to himself.

Q. Yes, but the edger-man uses steam to lift the rolls, doesn't he?

A. Yes, and as he holds the lever down to keep the rolls down so the steam can't lift the rolls unbeknown to him.

Q. Are you sure about that? Does he have to keep his hands on that lever to hold the dead rolls down?

A. Yes, sir. When he takes his hand off them rolls, is taking a chance them rolls fly up.

Q. What will make them fly up?

A. A little piece of bark or anything.

Q. You don't mean they use steam to hold the rolls down do they? A. Sure they do.

Q. You are sure of that? A. Sure. [121—68]

(Testimony of P. H. Endner.)

Q. You are sure that is so in the Filer & Stovel edger? A. So in all edgers.

Q. So with all edgers? A. Yes.

Q. So they both use steam to raise the dead rolls, and they use force to hold them down?

A. That is what they are putting them down for, yes.

Q. You are sure of that? A. Yes.

Q. Now, isn't this a fact, that they use steam to raise these dead rolls, and that when they want them lowered, they shut off the steam, and the dropping of this lever opens the exhaust and the steam runs off and lets the rolls drop. Isn't that so? A. What holds them there then?

Q. Their weight. Isn't that right?

A. No, sir, it isn't.

Q. How much would you say the dead rolls on the Filer & Stover edger weigh?

A. They weigh eighty or ninety pounds apiece.

Q. How thick through are they? How much diameter?

A. From four inches to the size of the edger. I don't know what size edger they have.

Q. Assuming one of the large size edgers?

A. Ten inches.

Q. Would be ten inches through?

A. A ten-inch edger has got to have six-inch roll or eight-inch roll.

Q. What is the largest size an edger will make?

A. Twelve inches.

Q. What size dead roll has it got?

(Testimony of P. H. Endner.)

A. Eight inches. [122—69]

Q. Aren't those solid? A. No, sir.

Q. They are hollow, are they? A. Yes, sir.

Q. You are positive of that? A. I think so.

Q. And they weight ninety-five or a hundred pounds? A. Not a big one, a light one does.

Q. How much does a big one weigh?

A. About two hundred.

Q. You say they use steam to press these down all the time?

A. Yes, sir. Steam, air, or electricity, either one.

Q. Which mills use electricity?

A. Well, the Peninsula Lumber Company.

Q. They use electricity to hold this dead roll down, is that right?

A. They have an electric edger.

Q. What holds the dead roll down in one of these electric edgers? A. Electric power.

Q. Power?

A. They just use electric instead of air or steam.

Q. Just explain to the jury how they cause electricity to open the rolls.

A. Done by a little motor.

Q. The motor causes the roll to roll, or what?

A. Causes it to raise or lower.

Q. Now, there is an arm off there or lever that regulates this, isn't there? A. Beg pardon?

Q. There is a lever on this valve that regulates the bringing of the steam in and letting it out. [123—70]

(Testimony of P. H. Endner.)

A. That is what the edger-man does with the lever in front of him.

Q. Can you look at the picture there and see the lever?

A. I can't see that lever, but I can tell you where the lever is.

Q. See if you can see it on this one.

A. That is a double edger.

Q. Did you ever see a Filer & Stovel double edger? A. Yes, sir.

Q. What mill did you see that in?

A. Vernonia mill.

Q. You worked out there, did you?

A. No, sir.

Q. You made a special trip out there, didn't you?

A. I made a special trip out there to get a job; that is, superintendent of the mill.

Q. Are you working for them now as superintendent? A. No, sir, I am not.

Q. And you can't see that lever on there?

A. I can't, no, sir.

Q. Can you see the picture without your glasses?

A. Yes, that.

Q. But you mean you can't locate the lever?

A. I can locate it, yes, but I can't see it. I know where it should be.

Q. Now, let's take this proposition: Here is a lever. I am the edger-man; you have seen this edger, and I haven't. I have just studied this from what I have been able to learn. I am

(Testimony of P. H. Endner.)

the edger-man. Here is the edger in front of me. The lever is over here. I use the right hand to use it, don't I? [124—71]

A. According to what kind of a machine it is; right or left?

Q. Do they make left-hand edgers?

A. The way you stand, yes.

Q. As far as I am concerned, I will use the left hand, then, as you say for a left-hand edger?

A. Yes.

Q. I take hold of this lever here; the lever sticks out from the edger a ways?

A. Right over the top of the roller.

Q. Not as long as that. The handle is about that long, isn't it?

A. Lays lengthwise of the rolls.

Q. Rises up and down like that; doesn't go up and down like that?

A. I don't know how it is fixed over there. Most of them lift right up, leave the roll at the top of the edger.

Q. This handle leaves the roll and got a piece running down to the cylinder, hasn't it—the valve?

A. On the end.

Q. Two pieces run in. Just take now where the valve is over here at this end, and has just a straight arm running out from here and a handle here. I take hold of the handle and raise it up, and that lets in steam? A. Yes.

Q. How do you let the steam out? A. Down.

Q. Let down? A. Yes.

(Testimony of P. H. Endner.)

Q. What was the position the lever was in when you turned in the steam to hold the roll down? A. Down. [125—72]

Q. Clear down here? A. Yes.

Q. When here the cutter is off? A. Yes.

Q. Is that a fact?

A. Yes, you can let all of the steam out of the cylinder, or half of it. If you cut ten by ten or eight by six, or ten by twelve, your cylinder is still half full of steam. If you put through a one inch board, your cylinder is almost vacant of steam.

Q. What is that? The same pressure of steam all the time, isn't there? A. No.

Q. You mean there are two different streams of steam that flow into that cylinder? A. No.

Q. I am not much of a mechanic, but a cylinder can only run one way, can't it? The steam just pushes it out one way?

A. Which is out one way and in the other. When this lever comes down—when the cylinder comes down inside of it, that forces that steam out. The lower you lower that cylinder, the less steam will be in there, with the exception of a little bit under the valve.

Q. This is true of these edger cylinders, is it Mr. Endner? A. It is true of all cylinders.

Q. You are thinking of locomotive cylinders, aren't you?

A. No, I am not thinking of locomotives. I am thinking of edger cylinders, log cylinders, or any.

(Testimony of P. H. Endner.)

Q. Where were you when you took an edger cylinder apart?

A. Never said I took one apart.

Q. How do you know what is in there then? [126—73]

A. From what experience I had in the mill business.

Q. Somebody has told you about what is in there, is that it? A. No, sir.

Q. How did you find out? Do you read about it? A. Just helped put them together, is all.

Q. Never took them apart, but have helped put them together?

A. Have helped put them together, lots of them. About a week ago is the last experience I have had putting a cylinder in.

Q. What kind of edger did you put together then?

A. That was a hand edger. I didn't put any together there.

Q. On those little edgers they do run that lever by hand, don't they? A. Yes.

Q. Now, the same principle applies to the little edger that applies to the big one, doesn't it?

A. No.

Q. What is the difference?

A. They don't have any lever on the rolls of the little edger.

Q. How do they lift the dead rolls of the little edger?

A. They lift the weight and arm, and chains

(Testimony of P. H. Endner.)

come down and fasten down to the roll; when want to raise and lower to put a big cant through there, he pulls down that way and lets go, but that weight holds the pressure of that roll down.

Q. He don't have to put his hand on there and pull down on it there *after lets* go?

A. That is the chief purpose of it. [127—74]

Q. Not the same principle? A. No.

Q. Don't have to pull down on that on the small edger; they won't have to keep the steam on all the time to keep it down.

A. Weight enough in that box to keep it down.

Q. That is not true with the big machine?

A. Yes, just the same, only the down steam, or the steam in that cylinder holds that roll down in place.

Q. That is quite important. Are you quite positive that the steam holds the dead roll down?

A. Yes.

Q. You are just as positive of that as anything you testified to in this case? A. Yes.

Q. That is right, is it?

A. Well, I wouldn't say anything I wasn't sure.

Q. I mean you actually examined the cylinders so that you know of your own knowledge, having seen it, that steam forces these dead rolls down?

A. I don't say that I seen it nor examined it. I said the experience or knowledge of millwrighting and helping to put up mill we hear everything, and the engineer that takes care of them

(Testimony of P. H. Endner.)

usually takes and puts them together, and we help them.

Q. But he tells the theory of that, is that it?

A. Yes, we see it when it is undone.

Q. I understand that you have seen one of these cylinders apart?

A. Not that kind, no. [128—75]

Q. Never saw one of that kind apart?

A. Not that kind.

Q. Then I ask you again how you know how it is constructed if you have never seen it apart?

A. Well, I have seen other cylinders. I didn't say I had seen the Stovel apart.

Q. You have never seen it? A. Not apart, no.

Q. All you know about the construction of the Filer & Stovel cylinder or valve, is what somebody else has told you about it? A. No.

Q. How did you arrive at that answer? The conclusion is logical to me.

A. Any edger is operated as near as can be the same as any other, the steam lifts or the air lifts or the electric lifts; they are practically on the same basis.

Q. Well, you think they are, but if you have never had them apart, how do you know?

A. Well, there is nobody knows, then.

Q. What?

A. The edger-man even himself couldn't tell you that then unless taken them apart.

Q. That is what I say. I am willing to admit that. If he hasn't taken them apart.

(Testimony of P. H. Endner.)

COURT.—I suppose a man working on one machine knows whether the steam holds the rolls down, or whether down by its own weight, knows that by experience and observation?

A. Yes. [129—76]

COURT.—Without taking them apart?

A. That is all. Can't take them cylinders apart in ten minutes; takes a long time, and it is seldom they get stuck.

Q. Where did you ever set up a Filer & Stovel edger? A. I don't know as I ever set up one.

Q. You are superintendent of what mill now?

A. Wiebel Lumber Company.

Q. Where is that located? A. Railhead.

Q. Is that out from Eugene? A. Yes.

Q. How many miles out from Eugene?

A. About one hundred and twenty.

Q. Where is the headquarters of that company?

A. Up at Odell Lake.

Q. How many feet capacity has that?

A. About twenty-five thousand; they are just cutting tunnel timbers there.

Q. Are they running an edger now? A. Yes.

Q. Wuberg? A. Wiebel Company.

Q. Now, their postoffice address would be Eugene? A. Would be Railhead.

Q. There is a postoffice there. Now, Mr. Endner, you said something about there being a nut inside of the edger that the edger-man could take and adjust so that the dead roll would come down within way one inch of clear down, or stay two

(Testimony of P. H. Endner.)

or three inches, according to the type of lumber. Where is that nut? A. Inside the framework.

Q. If the nut were adjusted then on the Filer & Stovel edger, and the steam were turned off, the dead rolls [130—77] would drop clear down of their own weight, would they not?

A. Drop down until they struck this bolt, yes.

Q. Suppose was not any timber coming through at all, the edger is empty of lumber, and this nut were adjusted so that the rolls could drop clear down and touch the live roll beneath, and the steam were turned off, in other words the edgerman had raised his lever, lifted up the dead rolls, and lowered his lever, these dead rolls would drop clear down and strike his live ones, wouldn't they?

A. No, sir.

Q. How far would they drop?

A. Couldn't drop within one inch.

Q. Couldn't the nut be adjusted so would drop within one inch? A. They never do that.

Q. Suppose he did adjust.

A. Suppose he did do it, however, the edger put in motion, what would happen if these two rolls came in contact?

Q. What would happen?

A. It would break it, that is all.

Q. Break it? A. Certainly.

Q. You mean if the two rolls touched, they would break?

A. Certainly. One runs so much faster than

(Testimony of P. H. Endner.)

the other, and one is corrugated, and the other is not.

Q. But it rolls just as fast as any one wants it; it is on ball bearings? A. No.

Q. What kind of bearings? A. Just a box.

Q. Like a railroad car?

A. The shaft runs in a box. [131—78]

Q. The same kind of a hinge as a railroad wheel sits in the railroad car. Is that right?

A. Yes, only smaller.

Q. And you say that the mere fact that those came together, one would break?

A. Naturally. If one part was weak, or the upper wheel was wore a little bit by some sand flaw.

Q. Suppose a brand new mill just opened.

A. Lots of flaws in rolls, even if they are new.

Q. Suppose a brand new roll, no evidence of any flaw in this roll; suppose no flaw in it. You say if they came together, one would break?

A. No, wouldn't naturally break if brand new.

Q. Why wouldn't both turn, the corrugated one make the other one turn?

A. One would drive the other so fast, I wouldn't want to be there.

Q. How fast is that corrugated one turn? How many revolutions per minute?

A. They should run according to the speed of the machine; probably about two hundred feet a minute.

Q. Two hundred feet a minute?

A. One hundred and fifty feet a minute.

(Testimony of P. H. Endner.)

Q. How wide a diameter is the corrugated wheel?

A. In diameter?

Q. Yes. A. About six inches.

Q. Roughly, that would be about three times to get your circumference—would be eighteen inches. If it went two hundred feet a minute, would be one hundred and thirty [132—79] revolutions a minute it would make. You say it goes that fast?

A. I said about one hundred and fifty feet a minute, according to the speed of your engine.

Q. If it went a hundred and fifty feet a minute, then it would make a hundred revolutions a minute, the live roll or the corrugated?

A. I said one hundred and fifty feet a minute.

Q. If a foot and a half in circumference, it would be a hundred revolutions a minute for that roll.

COURT.—You can figure that out.

A. But he just wants to get a fellow balled up. It is reduced to inches—put in six inches, going one inch—that is six to one.

Q. You say the dead roll can't turn that fast without going to pieces?

A. Shouldn't. That is on slow feed.

Q. Should not turn that fast? A. It doesn't.

Q. It doesn't? A. No.

Q. It turns as fast as anything that touches it, won't it?

A. Put your timber in there, and she will roll as fast as the bottom.

Q. But if you just put so touched, it won't roll.

(Testimony of P. H. Endner.)

A. You put iron and iron together, and wood and iron together, it is two different propositions.

Q. Iron and iron won't roll?

A. Well, they break, one or the other has to break. [133—80]

Q. I may be wrong, but I thought just like two cog wheels come together; have seen lots of them turned together and never break.

A. They have pinion mesh. When you put two wheels together, and one corrugated and one not, there is friction, and something has to break, either break the teeth out of the lower roll, or break the other one.

Q. The dead roll is not fixed; it can turn there.

A. Just by the power of the lower roll.

JUROR.—The speed of that saw is regulated, fast or slow, the way they want it; the speed of the saw can be regulated as they want it, fast or slow.

A. If you release your roll, and get your timber into the edger, it is the edger's, and not yours till it comes through the edger. You can't slow it up or speed it?

JUROR.—Isn't it a fact they put different speeds on at different times, and regulate the speed according to the way they want it?

A. They do the timber, yes, but in a big mill like that the edger-man is pretty well filled up all the time, and the faster it comes, the better he likes it.

Q. Now, I will explain this drawing. This is the covering on both sides of the edger; just look at it from the side. Here is shows the live roll on one

(Testimony of P. H. Endner.)

side, the live roll on the other side, and here is the different positions of the dead roll. Here is well down, and that shows them up, and down, and up. This is the cylinder up here. This is the piston rod that presses up with these levers, and causes this to raise up and lower; here is the lever that you [134—81] raise to move this valve; the valve fits on the wide of the cylinder. Here the steam comes in, comes out here, comes over behind, and comes out of that exhaust. Does that look to you like a drawing of the Filer & Stovel edger?

A. No, the Filer & Stovel, as I said before, is right across here. Here is the top of your roll; he takes this and moves it up and down. I never seen that on any machine, unless a new improvement.

Q. You are familiar with all the late improvements, are you not?

A. I am supposed to be. This is something new the last six months.

Q. Direct your attention to this Exhibit "A," indicate where that bar would run across that double edger, and how far across there it would run? Where was this bar on the double edger?

A. There is the double edger. This car here—the back edger would run from here to here into the roll.

Q. Why would they have a bar running clear across there?

A. So the edger-man would not have to stand in one position to run it.

Q. Would the edger-man dare to stand on either side around the edger?

(Testimony of P. H. Endner.)

A. Sometimes they do, but the bar that runs to the middle edger is connected here, and runs over to the other edger.

Q. Now, the principle of the valve would be the same, although there was a bar here instead of single handle? A. The bar runs over here. [135—82]

Q. That should lift up and move the valve just the same? A. Yes.

Q. All right. Now, do you recognize this as the inside of the valve? A. That is inside the valve?

Q. Now, just take the pointer and point out what position; which one of these represents the position of the valve when the steam is coming in, and which one when going out? A. This one is in.

Q. That is where coming in?

A. Comes in this way and goes out that way.

Q. Suppose for your information that this is the steam intake up here. Show where the steam comes in and goes out.

A. In through here, out through here, out that way.

Q. That goes into the cylinder. You see this is the piston of the cylinder here. Just trace the steam as it enters in from where it comes in the cylinder.

A. In here, out here and out here.

Q. Out into the cylinder?

A. Yes, here she comes in around through this out into this part.

Q. That is a solid piece of iron. That red indicates a solid piece of iron? A. It does?

(Testimony of P. H. Endner.)

Q. Yes. A. Solid piece of iron?

Q. What is that?

A. Is this a solid casing?

Q. The center is solid just like that. [136—83]

A. There is no place for this steam to escape only through this.

Q. The steam comes in here and goes around here, goes out into the cylinder here, you say. Well, as long as this piece remains in that position, you see, the steam can't come back up here to escape, because that is a solid piece. When he moves this down, he twists this down; then that shoots the steam going in there; brings this piece around to that piece, and lets the steam go back out the cylinder and exhaust. Just show me on there when he moves the lever down, and the steam coming out in the exhaust, show me where this valve is turned in order to turn the steam on there, so it will press a different direction than it was pressing before?

A. The steam comes in this way. He is raising.

Q. Where it is in this position when coming in?

A. This turns. This works on a swivel when he turns. This forces this in that way.

Q. That lets the steam out? A. Yes, sir.

Q. But you said there was steam that went ahead and forced the dead rolls down. I asked you where that steam is?

A. When this thing is in that position, it can't move, and there is still steam underneath.

Q. How is it underneath there?

A. It holds it there.

(Testimony of P. H. Endner.)

Q. I know, but this is right on the side of the cylinder, and there is an opening all the way out. How could it hold steam in there?

A. You have your ports. You never can close your ports [137—84] only on one side; were left open; if you didn't would have no pressure to turn on again; have to turn by hand till you open that port and let the steam in there and lifted it.

Q. Where is the port?

A. This is the port here. This is the dividing center. If this thing was solid down here, you would have to lower that and raise it by hand until you got off that enter again, so the steam could come in to lift it.

Q. You just move this valve there?

A. By steam.

Q. Here is the handle; this fits the end.

A. The same as worked by hand. You do it by hand.

COURT.—If you are going to use that drawing, get some one that made it and understands it.

Mr. KING.—I am not putting my case about it.

COURT.—But you are asking this man, and he doesn't know about it. He never took one apart.

A. I told you all the time that was the machinist's part of the engineer. A millwright or operator has no business monkeying with any steam fitting.

Q. Let's get that clear. You only know the steam forces these rolls down? A. Yes.

Q. You don't know where it comes from or why?

A. Yes.

(Testimony of P. H. Endner.)

Q. That is right.

A. Yes, your own chart shows an opening in there for the steam while that thing is on this center.

Q. Where's the opening for the steam?

A. Right in here. [138—85]

Q. That is the exhaust.

A. Even so, there is enough steam in there to hold that. If there wasn't, you couldn't raise that again or lower it.

Mr. KING.—He claims to know about this, your Honor. The cylinder is off to this side here.

COURT.—Don't argue with him, then. If he claims to know that is his testimony, and you can argue to the jury, or some other witness.

A. The only thing I am arguing, your Honor, when two ports pass each other—there are two ports to every engine. One port is released, and the other one would go ahead; now, you close one port, and the other is open; just a trifle, to let steam enough in there to force that port there the other side; if you didn't, would have to do it by hand.

Q. You couldn't do it with this lever. All right. You have appeared as an expert in other cases, haven't you? A. One.

Redirect Examination.

(Questions by Mr. MOULTON.)

In those cables of hand or small edgers, where they depend upon the weight of the roll itself to hold it down, is there any added weight put in the roll?

A. Yes.

(Testimony of P. H. Endner.)

Q. What do they do? Explain how those things are made.

A. They have a long lever that comes down and hangs in a truss that this thing wiggles on, and the lever comes out where the edger-man can reach the rops and pull down that. When he raises that roll, he lets go of that, [139—86] and the weight of the lever is behind over the edger.

Q. Do they add any additional weight to the weight of the roll? A. No, sir.

Recross-examination.

(Questions by Mr. KING.)

You have never seen this particular edger upon which Mr. Simpson was injured?

A. I have saw both of them.

Q. What? A. I have saw both of them.

Q. Where did you see them?

A. Down at the mill, Vernonia Company.

Q. What day was that?

A. I don't know. I don't keep no dates.

Q. What month? A. Oh, that was in May.

Q. What? A. May.

Q. This last May?

A. Yes, about six weeks ago.

Whereupon proceedings herein were adjourned until 10 o'clock to-morrow morning. [140—87]

Friday, June 12, 1925, 10 A. M.

P. H. ENDNER resumes the stand.

Recross-examination (Continued).

(Questions by Mr. KING.)

Mr. Endner, I understood yesterday your testimony to be that an edger would not kick back if the valves were in proper condition. Is that right?

A. If the rolls are in proper condition, yes.

Q. Is the rolls are in proper condition?

A. Yes.

Q. If the edger man lifts the rolls up in the air, and keeps them up in the air, while a piece was going through, would that make the piece hit back?

A. No, sir, not naturally.

Q. If the dead rolls were not touching the piece.

A. No, sir.

Q. It wouldn't kick back?

A. Not naturally if the piece is in perfect condition, I mean as long as it didn't touch the back tooth, no chance. The further the stick goes through, the more danger there is.

Q. And if the edger-man lifted up the rolls, and if got through quite a ways, it might kick back.

A. Yes.

Witness excused. [141—88]

TESTIMONY OF JAMES M. RUE, FOR PLAINTIFF.

JAMES M. RUE, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows.

Direct Examination.

(Questions by Mr. MOULTON.)

Mr. Rue, what is your occupation?

A. At the present time I am engaged in the timber business.

Q. Have you ever operated sawmills? A. Yes.

Q. How much?

A. Well I was engaged in the operation of mills, and working in mills, since I was seventeen years old.

Q. Have you had anything to do with gang-edgers? A. Yes.

Q. You understand the mechanics and operation of them, do you? A. Yes, sir.

Q. What is the effect on the gang-edger if for any reason the rolls don't come down solidly on the timber that is being driven through?

A. Well, the effect would be, the board might throw back from the edger.

Q. Is it very liable, is the machine rendered liable to throw back boards by reason of the want of force on the rolls? A. Oh, yes. [142—89]

Cross-examination.

(Questions by Mr. KING.)

Mr. Rue, what do I understand by the words "want of force on the rolls"?

(Testimony of James M. Rue.)

A. That would be when the upper rolls didn't fit down tight and square on the board, it would have a tendency—the board would be loose, and the saw would naturally throw the board back.

Q. Am I to understand the upper rolls are held down on the board by steam?

A. Well, that is mechanical work of the machine. If the machine is in perfect mechanical workmanship, it ought to fit down close on the board.

Q. I mean what holds it down on the board? Is it held down by steam pressure?

A. Some by steam pressure, and some by other pressure. Levers, you know, lift them up, or you can let them down on some by steam pressure and different mechanical working in different edgers.

Q. Did you ever work a Filer & Stovel edger?

A. No, I never did personally, but I have been in mills where they had them.

Q. Are you familiar with the valves on the Filer & Stovel edger? A. Yes.

Q. How are the dead rolls lifted up on the Filer & Stovel edger?

A. Some of them are lifted by hand pressure, hand lever.

Q. Excluding those that are lifted by hand pressure how are they lifted up? [143—90]

A. Sometimes they are attached just to the lever, and you catch hold the lever and lift them; other times have a rope attached, so the rope will pull them up; sometimes the valves may get out of gear, might be the rolls wouldn't fit so tight, you see; they have to be adjusted from time to time.

(Testimony of James M. Rue.)

Q. That is the point I want to get. The dead rolls are lifted up by air or steam pressure, are they not? A. Yes.

Q. When you want them to come back down, what do you do?

A. You let go the lever as a rule, or the rope, or whatever is attached to the machinery.

Q. That lets out the steam, does it?

A. Supposed to if the machine working properly, yes. If it isn't working properly, it wouldn't do that. It must be a mechanical operation, or perfect working order, or sometimes it will stick. I have seen them do that; it isn't often it happens that way, but can happen that way. I have seen it that way.

Q. Have you seen them stick?

A. If the machine is in perfect working order, it should work when you let go; when you let go, should drop down.

Q. Suppose in proper working order and you let go and it drops down; is there any force of steam applied on the roll to hold it down on the lumber?

A. Yes, those rolls supposed to be held down quite firmly on the lumber.

Q. What holds it down—the weight?

A. If your rolls are not lying flat, and pressed down the board, the board will not go through the edger. [144—91]

Q. What is the roll held down by, what kind of force? A. That is steam force, as a rule.

Q. Where is that steam applied?

(Testimony of James M. Rue.)

A. Well, I don't know just exactly how that is applied, because I never did operate one personally, as I say. I don't know the mechanical workings exactly, how they would be applied. It is applied by steam.

A. Are you familiar with the nut inside the machine, which adjusts the height to which the roller can come down, the dead roll?

A. I have seen these taken apart and all adjusted at different times, but I don't know that I am just familiar with the exact conditions.

Q. Suppose that nut was adjusted so that the roller was not supposed to come any closer than one inch to the live roll down below, would you then say that the valve was defective because the roller didn't touch the live roll?

A. Well, if the nut was attached so it couldn't come closer than that, of course then that would be—

Q. What is that?

A. If the nuts were adjusted so the roller couldn't come closer than an inch, of course it wouldn't be the fault of the valves, I should say.

Q. Now, there might be other reasons too, why the top roller wouldn't come down, isn't that so?

A. Well, there might be, yes.

Q. You couldn't tell exactly without looking at the particular machine, could you, just exactly why the roller couldn't come down? [145—92]

A. No, you wouldn't. Have to look at it and see whether adjusted properly.

Q. If the roller was down sufficiently to draw a piece of lumber one inch thick in through the saw,

(Testimony of James M. Rue.)

the dead roller, would you say that the valves were working properly? A. Well, it ought to be.

Q. What?

A. It seems that it ought to be working properly if it would be adjusted so it would come to one inch.

Q. If it would draw a one inch piece of lumber into the saw, the dead roller must be down in proper position, is that right?

A. Well, it would appear that it ought to be, yes.

Q. Now, this strain on the live roll and the dead roll that are in the front part of the machine, when the piece is entering—comes when first entering in order to drag the piece of lumber up, doesn't it?

A. Yes, that is the main rolls that push the board on through the edger.

Q. Then when it goes through the saws, the live roll and the dead roll on the other side of the edger take hold of it? A. Yes.

Redirect Examination.

(Questions by Mr. MOULTON.)

Mr. Rue, you have been asked if it would drag a board through: Would it be in proper working order; do these rolls have any other purpose than merely to drag it through? [146—93]

A. Well, the purpose of the roll is to hold the lumber, to keep it from—keep it from shooting back through, and the other is for the purpose of pushing the board through, of course.

(Testimony of James M. Rue.)

Recross-examination.

(Questions by Mr. KING.)

If the piece was thirty feet long, and had gone through the saws for say at least twenty-nine feet of the thirty feet, would you say that the rolls on the edger were down properly, in proper shape?

A. Well, sometimes you know the rolls are not working exactly proper, and yet they will work, but they are not acting as they should act, and you are in a hurry, and can't stop to fix them just at the time.

Q. I am asking you about this specific question: Would you say that the rolls were down sufficiently if it would take a piece of lumber through there for twenty-nine feet of its thirty feet in length?

A. Well, that would be my conclusion that they were working properly, if it would do that, yes.

Witness excused. [147—94]

TESTIMONY OF OSCAR GEORGE, FOR PLAINTIFF.

OSCAR GEORGE, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. MOULTON.)

Q. Where do you live? A. Vernonia.

Q. What are you doing now? A. Oiling.

Q For whom? A. For the Oregon-American.

(Testimony of Oscar George.)

Q. You were working for that mill as oiler when Clyde Simpson was hurt, were you? A. No, sir.

Q. What were you doing there then?

A. Working as extra.

Q. What was the nature of your duties?

A. Well, all over the mill.

Q. Were you there when Simpson was hurt.

A. Yes.

Q. How did you come to be there?

A. Well, I was working was the reason I was in the mill.

Q. How did you happen to be right where Simpson was, or where were you?

A. Well, it was just about quitting time, and in the afternoon after the mill blowed off, I always helped the millwright.

Q. What did you see happen at the time Simpson was hurt? [148—95] Just start at the first when you came up, and tell the jury what happened.

A. Well, the only thing that I saw was that he lined the board and turned around, and walked back around the roll, and turned around, and the board hit him.

Q. Where did he stand to line the board?

A. Well, he stand on the right-hand side of the edger.

Q. Now, there is a set of rolls there, is there, a set of rolls that take the board from where he lines it up, is there? A. Yes.

Q. Here is this picture, this Defendant's Exhibit

(Testimony of Oscar George.)

"A." Can you point out on that where Simpson stood to line that board?

A. Well, he would stand right on this right side of the board, facing the edger.

Q. That would put him where? Between the conveyor and the rolls?

A. Between the rolls over her. The roller bands of band mill and the roll of the edger.

Q. That is where the conveyor-rolls bring the lumber down there? A. Yes.

Q. He stood between those and the edger-rolls?

A. Yes.

Q. Where did he go after lining that board up?

A. He walked right around on back of the roll and stopped back there, stopped right along here.

Q. Where did he stop with reference to these pedals? A. That time? [149—96]

Q. With reference to the pedal?

A. He stopped about in here some place.

Q. There has been a little "S" marked in there. I don't know whether you can see it or not. How does that compare with the place he stopped?

A. That is about where he did, right along in there. Maybe a little to the right.

Q. Did you notice how far the board had got at the time he came back?

A. Well, I noticed after it had got back, how far it had got.

Q. Were you at any time observing the board as it went down into the edger? A. No, sir.

Q. With what force did the board go?

(Testimony of Oscar George.)

A. Well, I wouldn't say what force.

Q. How fast? Did it go slowly along the roll, or how did it go?

A. Well, it came fast.

Q. I wish you would come just as near as you could to giving the jury an idea of the rapidity with which it came out of the edger.

A. I don't know how to explain it.

Q. How is that?

A. I say I wouldn't know how to explain it. The board was coming fast enough that it wasn't touching the roll when coming back.

Q. Wasn't touching the rolls at all? A. No.

Q. How high from the rolls was it? [150—97]

A. I would judge about between a foot and eighteen inches.

Q. Was there any call or cry given as it came back? A. No, sir, not that I heard.

Q. What did Simpson do?

A. Well, when it hit him, then he turned and wheeled around, or went down to his knees, and got up and fell again, fell to his hands and knees that time, and tried to get up again. Then he fell to his face on the floor.

Q. What did you do?

A. I jumped over the rolls, and when he started to turn over on his face, I caught his head in my hands.

Q. Did you notice the boards that lay there?

A. Yes.

Q. Where did the board lay?

(Testimony of Oscar George.)

A. Well, it was lying just about in right where it hit him, just about the same place where it hit him.

Q. Did you notice the end of the board, the end that hit him, as to whether it had been sawed clear through or not? A. Yes.

Q. Was it sawed clear through? A. No, sir.

Q. How much did it lack?

A. Well, I should say about six inches.

Q. How had that board been separated?

A. It looked as though split off.

Q. And did you then as you sat there holding him, did you turn and look back at the rolls at all?

A. Yes.

Q. What condition were they in, as you looked back? A. The rolls were up?

Q. How far up.

A. I guess about six inches. [151—98]

Cross-examination.

(Questions by Mr. KING.)

I don't quite understand where the piece of lumber was when it stopped after it hit him. Would you indicate on that picture?

A. Was laying on the rolls just about in line—in the same place where it hit him.

Q. Be on the roll and about the same place as that cant there? A. Laying over this way.

Q. Be diagonal?

A. No, straight; about straight; that way it hit him only over this way.

Q. I say more over on the roll there; is that right?

(Testimony of Oscar George.)

A. No, not so far over; about in line with where it came out the edger; where it was in the edger.

Q. Just heading right straight towards the edger along the rolls? A. Yes.

Q. How high is this last roll off the floor?

A. I don't know how high it is, not exactly; it is the same height as the others; they are all in line, level.

Q. Three feet off the floor?

A. I don't know. I never noticed them very close, you know, just how they are off the floor.

Q. Do you know about how high up they would come on you? To your hip would it be, or how far?

A. Well, they come, I would say about along there.

Q. Just about midway between—

A. Yes. [152—99]

Q. About here? A. Yes.

Q. How thick was the piece of lumber?

A. One inch.

Q. One inch in the rough?

A. Yes, sir; well, I don't know; an inch and a quarter in the rough, I suppose, is what they make.

Q. You went around and examined what was split off this piece, didn't you?

A. No, sir, I didn't examine it. It was laying close to my head as I was holding his head in my hand, and I shoved it over back is how I came to notice it.

Q. That is the only attention you paid to this piece? A. That is all.

(Testimony of Oscar George.)

Q. That part of the piece that was split off would be thirty feet from you, wouldn't it?

A. Would be thirty feet from me?

Q. Yes, thirty feet long, wasn't it?

A. I don't know.

Q. Where was Simpson lying when you took hold of his head?

A. He was lying between these pedals and this roll.

Q. Now, a piece was split off the end piece of this cut, wasn't it? A. Yes.

Q. Where was the place where you saw an indication that something had split off that piece? Had not been sawed clear through.

A. This end was laying over this roll, and when we turned around, it was nearest to my head, and I shoved it in.

Q. And it was split on which side? [153—100]

A. Split on both sides.

Q. Split on both sides?

A. Split off on both sides.

Q. There was a piece evidently split off from the right side of the piece as it laid on the roll, and the left side? A. Yes.

Q. About six inches from the end? A. Yes.

Q. Your duties required you to be all over the mill. Is that right? A. Yes, sir.

Q. Simpson was promptly removed from the mill, was he not? A. Yes, sir.

Q. And medical attention was summoned right away?

(Testimony of Oscar George.)

A. Well, I guess they were. I didn't go to the doctor's office with him.

Q. They didn't lose any time taking him to the doctor's office, did they? A. No, sir.

Q. Did you look towards the rolls on this edger after this accident and when you were there with Mr. Simpson? A. Yes, sir.

Q. I didn't get it clear. You have there an awful lot of rolls, of course you know, connected with this edger; rolls leading up to where the lumber comes in; dead rolls up above and around the edger; which rolls were you speaking about?

A. Well, I spoke of all of them as far as that is concerned.

Q. When you say the rolls were up six inches, which ones do you mean?

A. I meant the dead rolls on the edger.

Q. Were up in the air six inches? A. Yes, sir.

Q. Did you go around the edger? A. No, sir.

Q. Where was Pete Matesco?

A. The edger-man?

Q. Yes. A. Well, he was at the edger, in front. [154—101]

Q. On the side where you and Simpson were?

A. Yes, sir.

Q. Did he have his hand on the lever?

A. Well, I never noticed whether he did or not.

Q. Was he standing right by the lever?

A. Well, he was standing by the side of the edger where the lever is.

(Testimony of Oscar George.)

Q. You didn't notice whether his hand was on the lever? A. No, sir.

Q. Would you say that his hand wasn't on the lever, so as to lift the dead rolls up, at that time?

A. I wouldn't say they wasn't or I wouldn't say they was, because I didn't notice it.

Q. You didn't notice that? A. No, sir.

Mr. MOULTON.—Are you going to stand upon the denial in the answer that Mr. Simpson died as a result of this blow? If you do I will go into the nature of his wound.

Mr. KING.—No, I think not. I think we admit that.

Mr. MOULTON.—If you admit that he died as a result of this blow we will not go into that.

Mr. KING.—We will admit in this way: As I said to the jury in the opening statement that in spite of medical attention, infection set in and he died as a result of that.

Mr. MOULTON.—I want to find out if you make a point the man did not die as a result of this blow. That is the limit of my proof. I will go in and bring out the nature of the wound and the nature of the man's subsequent sickness.

Mr. KING.—I don't intend to urge it. I just want [155—102] to place before the jury that infection set in after several weeks' treatment.

COURT.—You admit that Simpson died as a result of this injury?

Mr. KING.—Yes, your Honor, through the intermediate means of infection.

(Testimony of Claude Gibson.)

COURT.—Died as a result of this injury then?

Mr. MOULTON.—That is what I want to get at. I don't want to try the question of the nature of the injury and the subsequent treatment and sickness unless necessary.

Witness excused. [156—103]

TESTIMONY OF CLAUDE GIBSON, FOR PLAINTIFF.

CLAUDE GIBSON, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. MOULTON.)

Where do you live Mr. Gibson?

A. Vernonia, Oregon.

Q. What is your occupation?

A. I was spotting the long edger.

Q. What are you doing now?

A. Working nights.

Q. In the same manner? A. Yes.

Q. How long had you worked in that mill when Clyde Simpson was hurt?

A. Well, I don't know how long it was. I started to work there when the mill first started.

Q. You knew Simpson, did you? A. Yes, sir.

Q. Where did you work during the time the mill had been in operation up to the time he was hurt?

A. I worked there with him for a while, and then I was on gang saw about three weeks, and then went

(Testimony of Claude Gibson.)

on the short side of the edger; was the short side of the edger when he got hurt.

Q. Had you been working before he was hurt in the same place he was working?

A. I was running jumpsaw, right where he worked; he was spotting.

Q. Did you have an opportunity to observe the manner in which this edger he was working on, and the one that is in controversy here, had been working?

A. Well, it was working all right when I saw it there. [157—104]

Q. What about during the time up to the time when he was hurt, what observation did you have in regard to whether the rolls on that edger laid down —came down in response to the lever, promptly?

A. Well, there was sometimes that they would stick.

COURT.—Sometimes what?

A. Sometimes they would stick and wouldn't come down.

Q. How often would they stick?

A. I only seen that stick a few times, not more than half a dozen times, I guess.

Q. What happened? You say half a dozen times?

A. Yes.

Q. What happened when they stuck?

A. Wasn't anything happened; they stuck, and stuck for a minute, then they would come down.

Q. Did you have an opportunity to observe how solidly they came down on these pieces—thin pieces?

(Testimony of Claude Gibson.)

A. No, sir.

Q. From your position all you observed was what you have already testified? A. Yes, sir.

Q. Where were you when Simpson was hurt?

A. On the short side of the edger.

Q. How far away was that?

A. I was on the other side of the mill, just opposite; I don't know how far that is.

COURT.—About how far?

A. About a hundred feet I imagine.

Q. Did you see the accident yourself?

A. No, sir.

Q. You didn't know it happened until you saw him [158—105] being carried out?

A. That is the first I noticed, when they carried him out.

Cross-examination.

(Questions by Mr. KING.)

You say the edger worked pretty well while you were there? A. Yes, sir.

Q. While you were there, when the rolls would stick, that didn't have any connection with the lumber kicking back, did it?

A. I never did see a board kick back on that account while I was there.

Q. What happened while you were there? For what reason did any lumber kick back?

A. I believe was only one timber kicked back while I was on there; that was a four by twenty-four lapped on top of another the same width and thickness; was lapped about half way; the first went

(Testimony of Claude Gibson.)

through and the second one hung; it couldn't come down on the rolls to get pressure enough to run through and it kicked back.

Q. I hand you Defendant's Exhibit "A." Do you recognize that as a picture of the gang-edger?

A. Yes, sir.

Q. Now would you indicate the position on that picture where the spotter would stand when spotting thirty-foot pieces of lumber.

A. Should be standing in here, out away from the board unless he has another on his transfer chain.

Q. Just hold that up and show the jury where he would be standing.

A. Standing in here unless he had another board in there. [159—106]

Q. Now after the piece was spotted and headed straight through the edger, what would the spotter do then? Where should he stand then?

A. Thirty-foot board?

Q. Yes.

A. Well, he could either stand over here or back here until he got it through.

Q. He wouldn't have any further duties to perform until the board was through, would he?

A. No, sir, not after the board starts through the edger.

Q. And do you say, Mr. Gibson, he should stand to one side or the other side while the board is going through the edger?

A. Well, unless he wants to get hit; he is taking a chance if he stands behind it.

(Testimony of Claude Gibson.)

Q. Is that any special knowledge that you have about the edger, or is that known among mill employees?

A. Well, I don't know. I have always made it a practice to stand away from the board after it starts in.

Q. Anybody tell you anything about that when you started to work there?

A. Yes, Pete told me when I first started to work there.

Q. Who is Pete? A. The edger-man.

Redirect Examination.

(Questions by Mr. MOULTON.)

What would the next duties of the liner-up be after the board went through?

A. To trip the next one by.

Q. Where would he go to trip that?

A. Go to his trip lever, next roll case on a thirty-foot board.

Q. Where are those trip levers? Point to trip levers? [160—107]

A. Trip levers right here; throw out trip levers back here.

Q. Are there any trip levers in there at all?

A. Yes, sir.

Q. What are these trip levers here for? There are three there.

A. That is the bumper lever here to raise and lower the bumper; these are trip levers that come in and start the transfer chains.

(Testimony of Claude Gibson.)

Q. What is the purpose of operating this bumper lever?

A. To let your timbers and slabs you don't want to go through your edger on down.

Q. Suppose you spot a board here and slabs were coming which you did want to send over the edger, where would you next go?

A. Push my bumper lever down and let the free slab go.

Q. Where would you go to do that?

A. On a thirty-foot board probably it would be about here.

Q. Would you be able to operate the bumper lever from there? A. Yes, sir.

Q. What lever would operate up there?

A. The first lever there; three levers there.

Q. Is there two levers on that bumper?

A. Yes, sir.

Q. What does this lever here operate?

A. The bumper.

Q. What does that connect with?

A. Connects with this pedal over here; then they run from there up to the bumper.

Mr. KING.—In other words, Mr. Gibson, they have a double set of levers there? A. Yes, sir.

Witness excused. [161—108]

TESTIMONY OF CHARLES FISHER, FOR PLAINTIFF.

CHARLES FISHER, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. MOULTON.)

Mr. Fisher, where do you live?

A. 748 Thirty-first Street, South.

Q. What is your occupation? A. Engineer.

Q. What else have you done besides engineer around a sawmill?

A. Well, I have sawmilled quite a bit—millwright.

Q. Where have you worked as a millwright?

A. I worked for the St. Johns Lumber Company; worked up at Bend.

Q. What mill in Bend? A. J. Croner.

Q. Yes.

A. Pine Tree Lumber Company; had charge of that for a year and a half.

Q. What other mills have you worked in?

A. Have worked in a mill up at Springfield and also above Springfield, another town; worked at the East Side Lumber Company over here.

Q. What experience have you had with steam?

A. I have had quite a bit of experience with steam.

Q. How many years? A. Nearly all my life.

Q. Are you familiar with the devices ordinarily used to lift the rolls of gang-edgers, the rolls—top rolls?

(Testimony of Charles Fisher.)

A. Most of them, yes, except the very latest patterns that come out; they are all worked by steam.

Q. Will you explain to the jury what the purpose of these [162—109] rolls connected with the gang-edger is.

A. Well, they were put there for holding the lumber down so the live roll will drag it through the saw without kicking back.

Q. What is the effect of these rolls sticking in any way so they don't come down solidly on the board? A. Well, liable to kick back in there.

Q. Just explain to the jury how it happens the lumber kicks back when the rolls are loose.

A. Well, when they start through, start a cant through and your rolls isn't down on your lumber to hold down and happens to get the least bit twisted the teeth catches in back and will kick her back, that is towards the liner-man.

Cross-examination.

(Questions by Mr. KING.)

Have you yourself operated an edger?

A. No, I never operated one, but I have had charge of them in the repairing of them.

Q. You have watched them work too, have you?

A. Yes, sir.

Q. Now, I will ask you this question: In the time you have been around edgers, and watched them work, did you ever see one kick back when the rolls were down?

A. Not when the rolls were down, I never did.

Q. Never did? A. No, sir.

(Testimony of Charles Fisher.)

Q. Well, now are you familiar with the little bolt underneath there that adjusts the distance the rolls come down?

A. They have what they call a bumping block on each side of the rolls for adjustment.

Q. That adjusts the distance the rolls come down? [163—110]

A. Yes, adjust the rolls so they will come down just to keep from hitting each other, one from another.

Q. The edger-man by turning a little adjustment in there can either keep them from coming down within two inches or four inches, or whatever he wants to set them. Is that right? A. Yes, sir.

Q. What force holds the dead roll down on the live roll?

A. Well, some of them held by steam, and some of holds themselves down, and others are held down by steam; they are not all made alike.

Q. Are you familiar with the Filer & Stovel edger? A. Well, I have saw them, yes.

Q. In the Filer & Stovel edger what holds the dead rolls down?

A. Well, some of them held by steam, and some of them are not. I don't know which pattern they have there, I couldn't say which make, I don't know.

Q. Now, when they want to raise the dead rolls they lift a lever which raises them up by steam pressure, is that right?

(Testimony of Charles Fisher.)

A. Yes, after lever is down, that lets the steam in from the lower port and forces up. Now, when they do raise that up and lets the steam in from the other port and shoves down on the timber.

Q. There are two different operations?

A. Yes.

Q. Where is the port through which the steam exhausts when they want to let it out of the cylinder?

A. Comes out through the same port it goes in when you cut down the other way; it is in your lever; the lever cuts your ports.

Q. Mr. Fisher, are you quite positive there is steam pressure [164—111] on these rolls when down on the lumber?

A. On some of them, I say they are. I am not familiar with this one, I don't know anything about it.

Q. You don't know anything about this particular kind of an edger then?

A. On some they force up and they force down.

Q. Lets confine our attention to the Filer & Stovel edger, which is the one in question. Would you say there was steam pressure on that edger that holds the dead roll down on the lumber?

A. Well, I say I don't know what make or what late pattern that is, but their old pattern I know some of them have steam pressure both ways.

Q. The old pattern. How many years ago was that you were familiar with the old pattern Filer & Stovel?

(Testimony of Charles Fisher.)

A. I think the last time I worked one of them was in 1907.

Q. Where was that? A. That was up in Bend.

Q. The Pine Tree Lumber Company in 1907?

A. Yes.

Q. Have you ever operated or seen a Filer & Stovel edger since that time?

A. I haven't been inside of a mill since that.

Q. Haven't been inside of a mill. Never have seen the Filer & Stovel edger since then?

A. Not the late pattern, no.

Q. Of course it is rather ridiculous to ask you this question. Of course you would not be familiar with the construction of the Filer & Stovel edgers now put out and regularly installed, would you?

A. No. [165—112]

Q. Nor its method of operation? A. No, sir.

Witness excused. [166—113]

TESTIMONY OF JOHN P. H. REICKA, FOR PLAINTIFF.

JOHN P. H. REICKA, a witness called in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. MOULTON.)

What is your occupation?

A. My occupation is edger-man.

Q. Where do you work? A. Muckle mills.

Q. Where? A. Muckle Lumber Company.

(Testimony of John P. H. Reicka.)

Q. How long have you operated a gang-edger?

A. About eighteen years.

Q. Are you familiar with the various types and kinds of gang-edgers in use along this coast?

A. Familiar with the Allis-Chalmers and Sumner and old type Diamond edger.

Q. On any gang-edger where several saws are used on one drum, what is the effect on the operation of the edger if the rolls don't come down solidly on the lumber?

Mr. KING.—I make the objection this man is not qualified with respect to the Filer & Stovel edger.

COURT.—He didn't ask about that. He asked on any edger. I don't suppose the particular type of edger would make any difference with the effect if the rolls shouldn't come down.

Mr. KING.—No evidence to show—

COURT.—I suppose the rolls operate the same. Counsel asked what the effect would be if the top roll didn't come down on the lumber that was passing through there. [167—114]

A. Well that would immediately place the man behind the works in danger.

Q. Why? That is your conclusion more than anything else.

Mr. KING.—I move to strike that out.

COURT.—Very well.

Q. Explain what you mean.

A. Well, in the first place the lumber if straight green lumber might carry through, and if was any

(Testimony of John P. H. Reicka.)

interference in the back of any machine through slivers catching between the roll and guide it would have a chance there to kick out of the machine.

Q. What is it makes the stick fly?

A. Causes them to cramp right away.

Q. Gives them the cramps. What holds from cramping?

A. In the first place a sliver will slip in between guide and saw; runs hot immediately. A board wouldn't pass that sliver, it would split; if a roll was down on there it would split to a certain extent and it would stick there, and it would crowd the saw sidewise until it would come in such heat that it would not travel any more. Then if there was any projection the roll wouldn't come down on the lumber, it would kick it through the mill. It all depends on how far the stick was through the saw.

Cross-examination.

(Questions by Mr. KING.)

Depends on how far the stick was over?

A. How far the stick was in the machine.

Q. Suppose the edger-man held up—lifted up the dead roll when the stick was stuck. Would that have the same effect? [168—115]

A. That would immediately throw the stick out.

Q. Yes, it would throw it out.

A. But most of machines have a reverse; they are not supposed to raise the rolls and let it fly, supposed to roll on.

Q. How many years did you work on edgers?

(Testimony of John P. H. Reicka.)

A. About eighteen years.

Q. Do you know any that you worked on that didn't kick back at some time?

A. I tell you they all kick back if you give them a chance.

Q. And now is there any particular position for the spotter to stand in when the lumber is going through the edger?

A. The spotter has just as much—has a lot of work to do himself; he has to sometimes hold over a stick; it depends on conditions, how the stick travels through the machine. If a heavy stick of timber sometimes has to hold it over until the stick gets a certain distance through the machine to make it travel through. Sometimes probably send timber five—twelve by twelve—ten by ten—rolls don't always lead straight to the edger, and it causes them to run away, your helper will help hold the stick over and hold it against the straight edge so it will help to travel straight; to keep from splitting the timber. That causes him to stand in a certain place sometimes. He has to work the same as anyone else. That is what he is there for.

Q. Is it dangerous, as a matter of fact, Mr. Reicka, for the line-up man to stand behind, directly behind the rolls when a piece of lumber is going through?

A. Is there danger— [169—116]

Q. Is it dangerous? A. Yes, there is danger.

(Testimony of John P. H. Reicka.)

Redirect Examination.

(Questions by Mr. MOULTON.)

What about his work there? You have been asked about it. Is there anything to call him there that he does have to stand behind? Dangerous or no dangerous, is there any work he has to do that?

A. Calls him back in line with the board?

Q. Yes.

A. Sometimes he is in a position he can't get out of there and causes him to stand there all the time.

Recross-examination.

(Questions by Mr. KING.)

Now when you make the last answer, Mr. Reicka, you have never seen the Oregon-American Lumber Company mill at Vernonia, have you?

A. Never have.

Q. And you don't know how much space there is on either side the end roll, do you?

A. No, I don't.

Q. You are not familiar where the levers are to operate there?

A. No, I don't, I don't know a thing.

JUROR.—The facts in the case are that for bigger square timbers they use a different resaw from those that resaw the inch lumber. Isn't that a fact? They don't use that big saw that take big timber for thin boards around there, do they?

A. You mean cut from one inch?

(Testimony of John P. H. Reicka.)

JUROR.—On the same machine.

A. On the same machine.

Witness excused. [170—117]

TESTIMONY OF MRS. MABEL SIMPSON, FOR PLAINTIFF.

Mrs. MABEL SIMPSON, a witness called in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

Mr. KING.—At this time I desire to admit that Mrs. Simpson is the wife of Mr. Simpson, and that the children are proper parties plaintiff.

(Questions by Mr. MOULTON.)

Mrs. Simpson, you knew Clyde Simpson, your husband, for how many years?

A. About eight years.

Q. And how long were you married to him?

A. Six years.

Q. How old was he? A. He was twenty-six.

Q. Twenty-six? A. Yes.

Q. What was the state and condition of his health up to the time he was hurt last September?

A. He was a healthy working fellow, he never missed a day in sickness.

Q. What was his physical ability to perform work? Was he able to perform his work?

A. Yes, sir.

Q. And what were his habits of thrift and industry? A. He was industrious.

(Testimony of Mrs. Mabel Simpson.)

Q. What were his habits in respect to contributing to the support of yourself and these children?

A. I don't know what you mean?

Q. Did he contribute to your support and the support of the children? A. Yes. [171—118]

Q. How much did he contribute?

A. Well, everything he made.

Q. How much was he making at the time he was hurt? A. He was drawing $5.00 a day.

Q. How steadily had he been employed there before that?

A. Well, he had worked every day that he went to work up there.

Q. Where did he live before he came to Oregon.

A. We lived in Arizona a while.

Q. I can't hear. A. At Cooley, Arizona.

Q. What kind of work did he do before this work?

A. I don't know I am sure. He worked in a mill at Cooley, Arizona, but I don't know what he did.

Q. He worked in a sawmill? A. Yes.

Q. What did he earn there, do you know?

A. I don't remember.

Q. Was he intelligent or otherwise?

A. Yes, he was intelligent.

Q. To what extent was he educated, did he have a good education, or how much education?

A. Yes, he had a good education.

Mr. KING.—I might ask one question. Had he completed high school?

A. Well, I don't know.

(Testimony of Pete Matesco.)

Witness excused.

Plaintiff rests.

Mr. KING.—Would your Honor entertain a motion for a nonsuit at the present time?

COURT.—No, I want the evidence first. [172—119]

TESTIMONY OF PETE MATESCO, FOR DEFENDANT.

PETE MATESCO, a witness called in behalf of the defendant, being first duly sworn testified as follows:

Direct Examination.

(Questions by Mr. KING.)

Where do you live, Mr. Matesco, at the present time.

A. Do you mean where I live now?

Q. Yes. A. Vernonia.

Q. You live at Vernonia. How long have you lived there?

A. Oh, I live about two years.

Q. And what have you been doing while you were in Vernonia, what work?

A. Oh, I build couple of houses for myself.

Q. Then what did you do after that?

A. I got a job in Oregon-American Lumber Company.

Q. Did you go to work there when the mill started? A. Yes.

Q. What job did you have there?

(Testimony of Pete Matesco.)

A. Edger-man.

Q. And you were edger-man right from the time the mill started, is that right? A. Yes.

Q. Are still edger-man there? A. Yes.

Q. Which edger do you run?

A. I run long side edger.

Q. The big edger? A. The big one.

Q. Did you ever run an edger before you came there? A. Yes, sir. [173—120]

Q. Where was that?

A. I run edger down on Grays Harbor, Aberdeen.

Q. Aberdeen, Washington?

A. Yes. Then I run edger for Silver Falls Lumber Company. Then I run edger down in South Bend, Washington.

Q. South Bend, Washington? A. Yes.

Q. How many years altogether have you been running an edger?

A. Oh, I run edger from 1915.

Q. 1915. Since 1915. You knew Clyde Simpson? A. Yes, I knew him.

Q. You remember when he came to work for you on that edger? A. Yes, sir.

Q. What job did he have on that edger?

A. He spot lumber for me.

Q. Did you explain to him how to do the work when he came there? A. Yes, sir.

Q. Now this edger. It has some dead rolls up above, hasn't it? A. Yes, sir.

Q. That come down on both sides. At the time of this accident how were those dead rolls working?

A. Oh, working pretty good.

(Testimony of Pete Matesco.)

Q. Working pretty good.

A. Yes. Sometimes stick, but when they stick I call mill foreman, and mill foreman call pipe steam-man to fix him up.

Q. Whenever they stick did you call the mill foreman and the pipe steam-man?

A. Not right away, you see, because he can't do it right away; maybe after hour at noontime, or after five, ten [174—121] minutes, twenty—I don't know myself you see, but can't fix it when I report. If be working a little bit he come and fix it.

Q. Do you remember when Mr. Simpson was hurt? A. Yes.

Q. What time of day was that?

A. That was fifteen minutes to five, to quitting time.

Q. Near quitting time? A. Yes.

Q. Now you remember how the dead rolls were working that day? A. Were working fine.

Q. Did the dead rolls come down on the lumber?

A. Yes, that day working fine, good.

Q. Working fine? A. Yes.

Q. Did you see Mr. Simpson get hit? A. Yes.

Q. Where were you standing at that time?

A. I stand right at the machine, across the machine.

Q. How tall is that edger? How tall is the table of it? A. From the bottom of the table?

Q. From the floor up, how far?

A. Must be four foot and a half, five foot.

Q. Five feet tall?

(Testimony of Pete Matesco.)

A. I think is over five feet, because I am six foot one and a half; times when I can't see across the edger much.

Q. Can't see across it?

A. Much. Just little bit.

Q. Do you remember what kind of a piece of lumber was coming through the edger when Mr. Simpson was hurt? A. Yes.

Q. Just tell the jury about what size it was.

A. It was fourteen inches—sawed timber fourteen by fourteen— [175—122] that is I had fourteen inches wide; I make two sizes, use two saws.

Q. How many saws were you using on it?

A. Two.

Q. When the piece came down on the conveyor from the head rig—isn't that where the lumber comes from? A. Yes.

Q. Let me show you a picture so we can get this. I show you Defendant's Exhibit "A." Take a look at that picture. Is that the edger you were working on? A. That is the edger.

Q. Where does the lumber come down there to come to the edger? A. From this roll here.

Q. When that piece came down that Simpson spotted as it was coming through at the time he was hurt, what size was it? What was its dimensions when it came down the conveyor to the saw?

A. Was fourteen inches wide.

Q. How thick? A. One inch.

Q. And how many feet long?

(Testimony of Pete Matesco.)

A. From twenty-eight to thirty-two, I don't know exactly.

Q. Now, Mr. Simpson spotted it on the rolls in front of the edger, did he? A. Yes, sir.

Q. Who set the saws? A. I set them myself.

Q. You set the saw to cut what dimension?

A. Yes.

Q. What size were you cutting out?

A. I cut from one inch to ten inches, and ten inches [176—123] thick and seven feet wide.

Q. This particular piece you were going to cut, this fourteen-inch piece, up into one by six, did you say?

A. Yes. I make two six from fourteen inches.

Q. Would it leave an extra strip of two inches?

A. No, because saw take three-eighths; each saw take three-eighth cut; that was what he cut. That pretty near no left nothing.

Q. I didn't know that. Takes three-eighths?

A. Takes three-eighths.

Q. That left nothing? A. No.

Q. That would leave a little bit.

A. Little bit, sometimes no, you see, because sometimes cut a little narrower, sometimes cut a little wide.

Q. A sawyer don't always get it accurate?

A. That is all.

Q. Just tell the jury about how far that piece was through your edger when it went back.

A. Oh, that piece it was through about twenty

(Testimony of Pete Matesco.)

foot, twenty-two through, was through the machine.

Q. About twenty-two feet had gone through?

A. Yes.

Q. Were the dead rolls down on it? A. Yes.

Q. Now, Pete, is there any steam pressure that is supposed to hold the dead rolls down?

A. Oh, yes.

Q. On the lumber? A. Steam pressure.

Q. Steam pressure holds it down on the lumber?

A. Yes.

Q. Pete, you just explain now, after the lumber is on the rolls—you just explain what you do in order to get it [177—124] to come through the edger.

A. I got to spot myself. I got to spot myself. Then I had a jump-roll to start. Lumber come across the machine, then it catch in feed-roll and top roll. I got to do nothing.

Q. Just watch it?

A. Watch the board go through. But if any hot saw inside the machine, then any machine is going to kick back, no matter if Allis-Chalmers, or Filer & Stovel, or Diamond, no matter what machine it is.

Q. What causes the saw to get hot?

A. Because we got some plugs and use pin inside, and then some stick get in between the pin and saw, and saw run faster and make so hot as lumber can't go through, have to kick back.

Q. Did you look at the saw after Mr. Simpson was hurt? A. Yes, sir.

(Testimony of Pete Matesco.)

Q. How was it?

A. It was hot. It was hot, pretty near smoking, it wasn't smoking, but pretty near smoking. I took a hose, I took a coil of hose and make it cool; we have a coil of hose.

Q. Just explain to the jury when you want to raise up the roll just how you do it. What do you take hold of?

A. I got a little handle, and when I want to raise up I raise; when I want to come down I come down, and the roll drops down.

Q. When the roll drops down and there wasn't any lumber there, I mean the rolls in front of the edger are empty, suppose no lumber there, and you drop hands down?

A. I got hands down, I got nothing to do any more. [178—125]

Q. Now, suppose you drop the handle down and let the dead roll down and no lumber in the edger, no lumber coming through, will the dead roll touch the live roll?

A. Sometimes touch, but it didn't touch.

Q. Sometimes touch? A. No.

Q. How close does it come?

A. Oh, about three-quarters of an inch.

Q. Three-quarters of an inch?

A. Just stay that way all the time.

Q. Can you adjust that distance, can you adjust that? A. No, I can't do that.

Q. Somebody else in the mill does that?

A. Yes, the steam-fitter.

(Testimony of Pete Matesco.)

Q. The steam-fitter does that? A. Yes, sir.

(Questions by Mr. ILLIDGE.)

May I ask one or two questions. I am familiar. Mr. Matesco, I call your attention to this diagram here. Can you tell what that is? A. Yes.

Q. What is that, explain it?

A. That is a roll. That is a roll here; that is saw in arbor; that is lever to raise up steam and come down rolls.

Q. That lever there? A. Yes.

Q. Is that the handle where you take hold?

A. That is the handle there. That is cylinder where raise these rolls.

Q. That is the cylinder? A. Yes, sir.

Q. If I understand you—is that the live roll?

A. Yes—no—yes, that is the live roll. That is the top [179—126] roll, what we call the feed-roll.

Q. Does that have power?

A. That is run by motor.

Q. That is turning all the time?

A. Yes, that is turning all the time.

Q. Is that a live roll?

A. That is a live roll; have two.

Q. That has power, too? A. Yes.

Q. And turning all the time. This roll, tell us about that roll. A. It is a top roll.

Q. Is that known as a pressure roll?

A. Pressure roll.

Q. And that is a dead roll? A. Dead roll.

Q. It does not turn? A. No.

(Testimony of Pete Matesco.)

Q. Except has something—

A. When the lumber come through on the feeder-roll then it roll just the same like the bottom roll.

Q. That roll, what material is that roll made of?

A. Steel.

Q. Is it a hollow cylinder or is it a solid cylinder, or what? A. Solid cylinder?

Q. This roll, is that solid steel?

A. Solid steel.

Q. What is the size of that roll, how long is that roll?

A. Oh, about—I think it is four feet, because I know in seven feet three rolls; seven feet machine and three rolls were there, three cylinders.

Q. Your edger is seven feet wide?

A. Edger is seven feet wide.

Q. You have three rolls?

A. Three rolls. [180—127]

Q. This roll?

A. Four feet long and the rest of it is about one and a half foot or more. I don't know exact, I didn't measure.

Q. This edger, is that what is known as a double edger? A. Double edger.

Q. Now, referring to this diagram, showing the rolls that lead to the edger?

A. This roll case, he come from the head rig.

Q. The head rig is the same as the carriage?

A. That is the roll case there. He come to big bumper here, that bumper come up and go down. When want to transfer lumber to edger, lumber

(Testimony of Pete Matesco.)

comes into these skids. These skids is for lumber here; handle myself, and skids too.

Q. Those skids, are they endless chains?

A. These skids bring lumber right there in line with the machine.

Q. Are they merely a piece of steel that is greased so something will slide on it, or chains?

A. Chain and steel; chains stay on top, and steel.

Q. The chain slides over the top of the steel?

A. Yes, and come down and up, because work in cylinder down there.

Q. And one system of chains—the skids take the lumber off the roll case as it comes from the carriage? A. Yes.

Q. And brings it over against—

A. Brings it to here.

Q. What are these called?

A. These are that come—I don't know myself what they are, [181—128] that is worked by steam. When the skids raise up it comes down.

Q. Did you operate this yourself?

A. Yes. That has been connected with some cylinder working this one and these skids; when the skids come up they come down; when the skids go down that come up; then I hit against the lumber to run the cant across the machine.

Q. When a piece of lumber comes from the carriage which is not shown on this diagram, but it would be down here, the lumber comes along here; is every piece of lumber that comes along here sent to the edger? A. No.

(Testimony of Pete Matesco.)

Q. Where does some of it go?

A. Goes outside for orders.

Q. Does it come past the edger?

A. Past the edger?

Q. Does some of it that comes from the carriage where the log is being sawed, go to the gang-saw?

A. Yes.

Q. Those pieces, do they come past here?

A. No.

Q. They go another route?

A. First is the gang, then had the edger behind.

Q. They come over the gang-saw and go through that and then they come back and come through the long side of your machine?

A. Come across the same edger, but the other side.

Q. You have nothing to do?

A. No, have another man.

Q. Another operator? You have nothing to do with the long side of this machine? A. No. [182—129]

Q. You have to do with the rolls? A. Yes, sir.

Q. On one side of the edger? A. That is all.

Q. Now, Mr. Simpson's duties were to do what?

A. He spotted the lumber for me.

Q. Now, to spot the lumber—for instance, here is a piece of lumber coming down along the rolls he wants to take and send to the edger, what is his first duty?

A. To transfer from here to here, that is all.

Q. Does he set his block, his bumper?

(Testimony of Pete Matesco.)

A. His bumper—he see pieces come from the edger, he stay bumper up all the time.

Q. His bumper is lifted up?

A. Yes, and let him come down, because the timber when come to saw has to be down; lumber on the roll.

Q. Does he lift his bumper up and press his lever when he wants the piece to come on, or does he press the lever and bring the bumper up when he wants to stop the piece?

A. No, no; when wants to transfer to edger he keep bumper up. When he wants to send slab to slasher bumper goes down.

Q. By setting that lever, can he set that lever and keep the bumper up without keeping his foot on the lever?

A. Oh, yes, he don't need foot put on lever.

Q. He can set it and leave it that way?

A. Sure.

Q. Now, his first operation, if I understand you right, he would already have his bumper set, and then what does he do now to get this piece of lumber to go towards the edger-roll?

A. Over through right there.

Q. Is there another lever that he touches, or is that running [183—130] all the time?

A. No, roller running all the time.

Q. Then when he puts his bumper up there it would carry the piece over in here, is that right?

A. Yes.

(Testimony of Pete Matesco.)

Q. Between the roll leading to the edger and the roll case? A. Yes.

Q. And then from there who takes it and puts it on the rolls leading to the edger? A. Me.

Q. You do that. These chains here, these skids convey, when you press the lever, this timber over on the rolls that lead to the edger? A. Yes.

Q. And then some other chains comes on to go back in reverse position against these mechanical pointers? A. Yes.

Q. Are those called mechanical pointers?

A. Yes.

Q. From what position could Mr. Simpson do his work? Where would he have to stand?

A. Oh, he stand—when the mill first started I said to Simpson, I say, "Simpson, be sure watch out and stay outside."

Mr. MOULTON.—I want to object to this on the ground there is no allegation of contributory negligence. This evidence, if it tends to prove anything, tends to prove contributory negligence. The answer is a general denial; no defense of contributory negligence at all in the case.

Mr. ILLIDGE.—I think he may show where the plaintiff's position was to do his work.

COURT.—You can do that, but of course you can't [184—131] show contributory negligence; can't claim any benefit on that account.

Q. Mr. Matesco, will you tell us—can you point out on this diagram *here* Simpson was—what his po-

(Testimony of Pete Matesco.)

sitions were for doing this work, whatever work he wanted to do.

A. When that lumber came from here, up there?

Q. Yes, about where would he stand to do that?

A. He stand here.

Q. Indicating between the rolls leading to the edger and roll case?

A. No, inside. That is the roll case. We got lumber across machine, then he can't stay here and he can't stay there.

Q. He can't stand either side?

A. He will not best stay behind the machine.

Q. Had he ever been instructed not to stay behind the machine?

Mr. MOULTON.—I object.

COURT.—I think the objection is well taken. You have not alleged contributory negligence.

Q. I will ask you where the levers are located to do this work?

A. You got one there. Some have got here for short stub.

Q. Short stub about what length?

A. About 28 feet. When he passed 28 feet have to dump him behind it and in behind this roller here sometimes. Got double for some work.

Q. Two positions the levers are in?

A. Two positions.

Q. He can do the work from either position?

A. That is all.

Q. Now, this deal roll, if I understand you, is

(Testimony of Pete Matesco.)

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Q. Two positions the levers are in?

A. Two positions.

Q. He can do the work from either position?

A. That is all.

Q. Now, this deal roll, if I understand you, is

(Testimony of Pete Matesco.)

about four feet wide and is made of solid steel? [185—132] A. Solid steel.

Q. And the dead roll on the opposite side of the edger, is that of similar construction?

A. The same.

Q. Now, I will ask you if there is any guard between this dead roll—well above the dead roll, that arm that holds the logs on the rolls? A. Yes, sir.

Q. What is that guard made of?

A. To make more—

Q. What is it made of? A. Steel.

Q. Made of steel. Do you know how thick that steel is? A. About an inch and a quarter.

Q. How wide?

A. About eight inches wide, nine.

Q. Eight or nine inches wide? A. Yes.

Q. And the length of the roll?

A. About three foot and a half.

Q. And then resting on that arm is this piece. Have you any idea what the weight of that steel would be—guard? A. I can't tell.

Q. Would it be heavy?

A. It is heavy enough all right. I can't say. It is heavy enough, but I can't tell you how much weigh.

Q. Is this dead roll heavy?

A. The roll like Allis-Chalmers big one; smaller than Allis-Chalmers.

Q. It is smaller, Allis-Chalmers?

A. No, Filer & Stovel.

Q. The Filer & Stovel are smaller than Allis-

(Testimony of Pete Matesco.)

Chalmers? [186—133] A. Yes.

Q. You cannot, you say, give me any idea—you don't know what they weigh?

A. One hundred pounds, five hundred, I can't tell. Nobody can measure because stands solid in the machine.

Q. Are those saws completely hidden? Are those saws inside completely hidden? Can you see them from the outside with your rolls down? A. No.

Q. They are completely protected all around, is that right? A. That is it.

Q. Now, this lever here that you have testified that you used when you raise that to this position. What does that do? A. When I raise it?

Q. This lever, when you raise to that position.

A. The rolls stay up.

Q. The rolls would be in this position, and when you put that lever back what happens?

A. Rolls come down.

Q. Does that roll come down of its own weight, or what? A. Steam pressure.

Q. Steam pressure holds it down, or the steam pressure only raises it?

A. I think steam pressure holds it down and raises it too.

Q. Steam pressure raises it. Can you tell me whether or not you know whether the steam pressure holds it down, or whether it comes down by its own weight?

A. I can't tell you that, because when I raise the

(Testimony of Pete Matesco.)

roll up and the roll comes down, then I don't know from steam pressure; it comes itself. [187—134]

Q. But it comes down? A. It comes down.

Q. Does it promptly answer to the lever?

A. Yes, sir.

Q. How fast can you raise that roll and lower it?

A. One second.

Q. One second? A. Come down and raise up.

Q. Now, are you familiar with the construction of that mill—are you familiar with the tailer's position—the tailer on that edger? A. Yes.

Q. Do you know Mr. Nye, Fred Nye?

A. No. Maybe I know him in face.

Mr. MOULTON.—Stand up, Fred.

A. Yes, I know him.

Q. Do you know him? A. Yes.

Q. Did he work at the Oregon-American Lumber Company's plant? A. Yes.

Q. What work did he do?

A. Worked behind the machine.

Q. Working behind your machine; worked behind this edger we are talking about? A. Yes.

Q. In his position where he does his work, is that on the same level of the floor this edger is on?

A. No, sir, he is standing below.

Q. He is down in a pit? A. Yes.

Q. That pit is about how deep?

A. About I think two feet; maybe more than that.

Q. His position then is at least two feet or more lower than the main floor of the mill where the edger is?

(Testimony of Pete Matesco.)

A. Not the mill floor, just the roller case floor.

Q. Well, the floor on which the edger sets? [188—135]

A. Yes, the edger sets on the main floor.

Q. The edger sets on the main floor, and his position is in a pit about two feet or more below the main floor? A. No, no.

Q. You tell it.

A. Because it is two foot from the roll case. When the lumber come across the machine, two foot from the main floor; then he had a roll behind about two foot; two or two and a half, I don't know for sure.

Q. Is his position lower than the position of the edger, where he stands? A. Yes, must be.

Q. He stands in a pit? A. Yes.

Q. You say you saw Mr. Simpson when he was hit? A. Yes.

Q. Tell the jury just what Mr. Simpson was doing and how he was standing.

A. I stay right there you see—yes, I stay here; I hold that lever; when the machine kick back and Mr. Simpson got hit in the left side right there, and it knock him down, this board twelve, fourteen inches, maybe got six, eight foot to go through and split in two when it got kick; the rest of it split in two.

Q. Now, Mr. Simpson—can you show us on here where he was standing?

A. He was standing there.

(Testimony of Pete Matesco.)

Q. Indicating the extreme end of the rolls leading to the edger?

A. Yes, that is right; he stay behind this last roll.

Q. What was he doing there, if you know? [189—136]

A. He not do nothing, because we got nothing to saw across the machine; just where he take the logs in the carriage.

Q. New log coming on the carriage?

A. New log coming on the carriage.

Q. And you had to wait for material?

A. That piece was the last piece from the log, what hit Simpson.

Q. Do you know what direction Mr. Simpson was looking?

A. He look in the west, maybe looking ahead or maybe looking at me; but I know that machine, he stay that way, and he got hit right there.

Q. Standing with his left side towards the rolls?

A. Yes, left side.

Mr. KING.—I would like to have these charts marked C and D for identification.

Q. Mr. Matesco I will ask you whether that appears to you to be a correct diagram of a side view of the edger?

A. Yes. (Referring to Identification "C.")

Mr. ILLIDGE.—I offer in evidence the paper identified by the witness.

Marked Defendant's Exhibit "C."

(Testimony of Pete Matesco.)

Mr. MOULTON.—Of course I don't concede the accuracy of any particular measurement.

Q. Now, referring to Defendant's Exhibit "D" for identification showing the live rolls in front of the edger, I will ask you Mr. Matesco whether you recognize that as a correct diagram, as far as you are able to tell, of the live rolls and skids?

A. Of what?

Q. If that, as far as you can tell, is a correct diagram [190—137] of these rolls as far as you know.

A. I don't understand.

JUROR.—Does that look like your machine? Does that look like it does there in the mill?

A. That is the machine; that is the first roll. That is—we got here jump-roll, but he don't work; he is right in here.

Q. And you went on down—

A. This roll the same as this; these all rolls same line right here; these skids I raise up and spot lumber for my machine, this one; this line another skids when I want line them up lumber, I use these skids.

Q. Then if I understand, there is a jump-roll in here? A. Yes, jump-roll.

Q. Aside from that, does this look like a proper drawing of the machinery around there?

A. Of the machinery, that is it.

Offered in evidence and marked Defendant's Exhibit "D."

Q. What was the purpose of the jump-roll?

(Testimony of Pete Matesco.)

A. Behind the skids.

Q. The jump-roll is a roll that is ordinarily lower than the other rolls? A. Yes.

Q. Who presses the lever to bring it up in place?

A. Myself.

Q. When you press a lever that brings the roll up higher than the others?

A. Higher, to start lumber to go to machine.

Q. That jump-roll, is that always turning?

A. Rolling all the time. Between these rolls that jump-roll [191—138] running all the time, because connected with these skids and these skids are running all the time. When running these skids running the jump-roll.

Q. These other rolls now, have they any power?

A. No, they are dead rolls.

Q. These other rolls are all dead rolls?

A. Dead rolls.

Q. In front of the edger? A. Yes.

Q. Now, when you have a piece of lumber spotted up against your mechanical pointers or your rolls in front of the edger, what do you do to start it through the edger? A. I jump with this roll.

Q. To do that you press a lever. Is that right?

A. Yes, I got my foot.

Q. That makes the jump-roll come up?

A. Come up, then bring the lumber to the edger. Then when it bring the lumber to the edger got two rolls, feed roll and top roll. Then I got nothing to do no more. And these dead rolls are running, you know, along the board.

(Testimony of Pete Matesco.)

Q. In other words, when the jump-roll commences to move a piece of lumber the lumber is moving over the other rolls causes the dead rolls to turn around. Is that right? A. Yes.

Q. Now, when your piece of lumber—when the jump-roll starts your piece of lumber moving, and the piece of lumber gets to your edger-roll, the feed rolls and the dead rolls, the presser-roll, do you have to move a lever to open the rolls?

A. I got to step to raise up this jump-roll.

Q. You have done that, and the lumber is coming towards the edger, it is coming to enter the edger, and there are [192—139] two rolls there, a feed-roll and a presser-roll; do you have to do anything to either one of these rolls? A. No.

Q. Can that piece of lumber go right in the roll, or do you have to do anything?

A. No, sometimes doesn't go in there.

Q. It hasn't got there yet. When do you use this lever here?

A. I use to raise up that roll.

Q. Do you ever raise these rolls from the piece in there? A. Sure, every one.

Q. Then when the piece of lumber is being moved towards the edger by the presser-roll, you have to raise this lever high enough— A. Yes, sir.

Q. —to raise the dead roll? A. Yes, sir.

Q. So the piece can enter, and then you lift the lever. Is that it? A. Yes.

Q. And the presser-roll comes down then on top

(Testimony of Pete Matesco.)

of the piece of lumber and the lumber starts through? A. Starts through.

Q. Now, these rolls then have to be strong enough to force that piece of lumber against this saw; or could that piece of lumber go through without that roll pressing it at all? Do you know?

A. Oh, if no hot saw, sure can go through.

Q. Let me see if I understand you right. Suppose you raise this roll with your lever; you have the lever in a raised position here. How wide can you raise that roll, how high? [193—140]

A. Ten inch stick. I can raise the roll eleven inches, but ten inch stick can cross the machine. Inch higher can raise than the timber can cross the machine.

Q. You can take a stick ten inches thick?

A. Ten inches.

Q. And can raise the roll eleven inches?

A. Eleven inches.

Q. Suppose you have a piece of lumber coming in here, in the edger, and you raise your lever and hold it up there, don't leave the dead roll come down; say one inch material, would the piece go through the saws?

A. You bet, if any hot saw inside.

Q. *If have* hot saw that piece could go through?

A. Yes, because feed-roll running.

Q. The feed-roll. And is the jump-roll running too? A. No, jump-roll comes down.

Q. After the feed roll takes, the jump-roll goes down? A. That is right.

(Testimony of Pete Matesco.)

Q. Then it is just the jump-roll that is forcing it through? A. Yes.

Q. The jump-roll, is that smooth or corrugated?

A. Rough, rough roll.

Q. After the piece has passed the first two rolls, the feed-roll and the presser-roll and passes through the saw—the saw passes through it—then it is the live-roll which is another feed-roll?

A. Yes, that is a feed-roll.

Q. And the dead roll or the presser-roll on the back side I will call that, does that then take hold of the board too? A. The saw end is the first one.

Q. Same in the back? A. Yes, sir. [194—141]

Q. And the piece would pass then right on through? A. Yes, sir.

Q. This piece that hurt Mr. Simpson, it had gone through all but about six feet?

A. Six or eight, I can't tell.

Q. It had gone pretty well through? A. Yes, sir.

Q. But was still a considerable portion of it, and then it kicked back? A. Kicked back.

Q. Was there any warning?

A. No, I don't know myself how.

Q. Any chance to give any warning?

A. No, kicked back just like a bullet.

Q. Was going through when all of a sudden kicked back? A. That is all.

Q. Is that something that does happen with edgers right along?

Mr. MOULTON.—I object to that as leading. The question is leading.

(Testimony of Pete Matesco.)

A. Yes, most of the time.

Q. I will try not to be leading. Does that happen often, you say?

A. I have that before we got Simpson killed, and after too.

Q. Does that happen often, you say. You say you have worked at other mills? A. Yes.

Q. Grays Harbor, and I think you said had been since 1915 operating edgers? A. Edgers.

Q. I will ask you if you know of any edger that will not kick back? A. Every one.

Q. Every one will kick back? [195—142]

A. Every one when got a hot saw inside.

Q. Do saws frequently heat in cutting lumber?

A. Yes.

Q. Do they, or do they not?

A. Some slivers, you see, between the guide, they make hot saw and lumber catches in there, going to kick back.

Q. I am asking you, Mr. Matesco, whether that is something that happens very often, that the saws become heated, get hot from slivers.

A. Yes, get hot from slivers.

Q. Now, when a saw gets hot from slivers, what happens to saw? A. What happens? Smoke.

Q. Smoke when hot. What else happens to the saw? Does it do anything to the saw?

A. No, no. I mean we get the feed-roll and this presser to pull back, keep back, then we have to oil.

Q. When the saw is cutting a board that is perfectly straight, is that the idea, cuts right straight into the board?

(Testimony of Pete Matesco.)

A. No, when hot saw gets snaky.

Q. When the saw gets hot what does it do?

A. Gets like a snake.

Q. The saws gets out of alignment. A. Yes.

Q. And is wavey? A. Yes.

Q. Presses against the side of the board?

A. Yes.

Q. And that is what throws it back. Is that right? A. That is it.

Q. How many different kinds of edgers have you worked on?

A. I worked on the Diamond, and Filer & Stovel, and that edger [196—143] that is built down there in Everett. I forgot what they call that.

Q. About how many different tpyes of edgers do you think you have worked on?

A. About four—Filer & Stovel.

Q. On these other edgers, is it common for the saws to become heated? A. Yes, every.

Q. On all edgers the saws become heated?

A. Yes.

Q. If anything was wrong at any time with the machinery, and you reported it, was it promptly taken care of?

Mr. MOULTON.—I object to that.

COURT.—It isn't a question of what the practice was,—what it did in this particular case.

Q. On the day Mr. Simpson was injured, was this edger out of order in any way? A. No.

Q. Now, immediately after Mr. Simpson was hurt what did you do? A. On it?

Q. In regard to this edger, yes.

(Testimony of Pete Matesco.)

A. When he got hit, you see, I jumped behind him and looked because I got awful sorry, I got no heart left.

Q. You have no heart left, you say?

A. I got no lift, somebody else come and lift.

Q. What I want to know, did you look?

A. After that I looked at the machine; the saw was hot inside.

Q. You looked at the machine?

A. Was slivers between the saws.

Q. Now, to look at the machine did you have to raise the rolls? [197—144] A. Yes.

Q. You raised the rolls to look in at the saw?

A. Yes.

Q. And you found that the saws were heated? How many saws heated? A. One.

Q. One saw was heated?

A. One saw was heated.

Q. Now, can you explain?

A. The saw was heated before; maybe was four inches, six inches, I don't know; but that time it was hot.

JUROR.—It come so fast through there the saw wouldn't have a chance to cool off?

A. No, because that come just like bullet.

Q. I will hand you a photograph marked Defendant's Exhibit "B," and ask you to state or indicate where you set the saws.

A. Right there. That was when the board come through I stay, like that. That is it, you see. That is the line-up. I stay the side of the machine.

(Testimony of Pete Matesco.)

When I want to set the saw I got to move between the machines.

Q. And at that time is there anything moving on the rolls here? A. No.

Q. Or do you stop them?

A. Just as I put the board through it comes over at once, I don't know how myself.

Q. But when you are setting your saws, do you step on your jump-roll and have a board moving toward the edger?

A. I am right to set, and start the machine then by the jump.

Q. Can you control the board on the rolls leading up to the edger, leave it still if you want to, before it enters the edger? A. Yes.

Q. You can keep it still?

A. Yes. [198—145]

Q. And you kept it still while you are setting your saws? A. I kept it still on the skids.

Q. While you are setting your saws. (He indicates these levers right in front of the edger that he sets the saws in any position that he wants to.) Now these things that you set the saws with, you take that little lever in front of the edger and you move it one inch or two inches?

A. No, one inch, two inches, four inches.

Q. Up to four inches?

A. Yes that can reach to four inches; if we want how wide we can, just four inches.

Q. What kind of a thing is it that goes around there?

(Testimony of Pete Matesco.)

A. Got a little fork and kind of a plug, and got a plug on one side, and another here; we got a plug, some steel to hold the saw, to make right lumber; between these forks when you got split pieces, slivers coming inside between the forks and saw, then make hot saw.

Q. If I understand, just like the first and second finger? A. Yes.

Q. And saw in between the two. A. Between.

Q. And by moving these levers in front of the edger that moves this fork?

A. This fork, got a fork on the lever.

Q. And the fork moves the saw? A. Yes.

Q. Now, the slivers, did they get between the fork and the saw? Did you find some slivers in there?

A. Every day; every day maybe fifteen or twenty times, when we get bum logs. [199—146]

Q. Do you frequently look? Do you have any means of cleaning up these slivers?

A. Yes, I got a stick; maybe four feet stick, and I pull it.

Q. Do you have any other means of cleaning out these slivers or sawdust? A. I got air hose.

Q. Compressed air?

A. Yes, just clean them up, to just what number we set saws.

Q. Now as I understand, these saws are so completely surrounded that you cannot see in there, is that right? A. No, I can't see.

Q. Except as you raise the rolls and look?

A. Except raise the rolls and look in.

(Testimony of Pete Matesco.)

Cross-examination.

(Questions by Mr. MOULTON.)

How long does it take a saw to get so hot it will throw a board?

A. Maybe take minute, maybe three, maybe ten.

Q. Who is supposed to look after the saw and see that it isn't heated?

A. Who is? The edger-man.

Q. When it gets hot enough that it will throw a board it has got so hot that the saw itself is weaving, isn't it?

A. When get a hot saw, snakelike with machine.

Q. And it smokes. Before it gets that hot it smokes?

A. Smoke when put water or oil on it and cool it up. It don't smoke before.

Q. The fact of the matter is, that it is your duty to keep track of it and see it doesn't get that hot, isn't it? A. Keep what? [200—147]

Q. Keep looking at it, keep your eyes on it.

A. Eye?

Q. Yes.

A. You can't keep an eye on it when you got the saw inside.

Q. All you have to do is to shove down the lever and stoop down and look under and you can see it, can't you?

A. Yes, but I got no time to do that, because a board come behind me all the time. If I not get through lumber—put through lumber I catch them

(Testimony of Pete Matesco.)

going to give me, put the hell to me, that is all. I got no time.

Q. If you took time enough, if you have time enough you could keep track of it all right?

A. Yes, when I got time enough all right.

Q. And not let it get hot?

A. No let it get hot.

Q. You stop it before getting hot? If hot you do not run a board through?

A. That time was hot saw when Simpson got hurt, you see; too hot; was enough for smoke you know, it was just hot; if it was four inches or two inches machine, wouldn't kick back; was light stuff, one inch, that is what reason the machine kicked back.

Q. Now, then, Mr. Matesco, you had been having a good deal of trouble with this machine, hadn't you? A. Good deal of trouble?

Q. You had been having a good deal of trouble with the rolls on this machine, hadn't you?

A. Yes, I had sometimes, but when I report, see, they fix them up. [201—148]

Q. When you would lift up the rolls by pulling down on your lever, and then let your hand up, the rolls would not come back down, would they?

A. Sometimes not, but most every time, lots of times coming.

Q. Sometimes come and sometimes not.

A. Because if we don't know were running—

Q. You don't have to argue with me, you can answer and tell me what I ask you, and that is all

(Testimony of Pete Matesco.)

you have to do. Whenever it would not come down you would have to jerk the lever a few times to make it come down? A. Jerk the lever?

Q. Yes. A. No.

Q. You did that didn't you, Mr. Matesco, several times; quite often you would kind of jerk the lever to get the valve loose enough it would come down. Didn't you?

A. No, sometimes the board can't go through because the man sawing don't saw straight.

Q. Leave that out. Lets stick to the rolls.

A. Thats what I do. I do that to press the roll and the board comes through; but I said to the man to stay on the side of the machine, because the machine can't kick; if going to kick, not at the side.

Q. Whenever you get to jerking the rolls, it can kick, can't it? A. Yes.

Q. And the reason why it makes it kick to loosen up the rolls— A. Makes it kick?

Q. Yes. Why does it kick more when you loosen up the rolls, when the rolls come loose on it? Do you know? [202—149]

A. Because the board not straight maybe kick, maybe not.

Q. If the board lay perfectly straight and ran perfectly straight, it wouldn't kick if it didn't have any force on top of it at all, would it? A. No.

Q. If the board would stay perfectly straight and was no rolls at all on top of it, it wouldn't kick, would it? A. Sometimes. We can't tell.

Q. Now, when the board is in these saws there

(Testimony of Pete Matesco.)

is a saw on each side of the board, isn't there? If we suppose these were round saws—the saw sits up on each side of the board? A. Yes.

Q. The board fits just exactly between the two saws? A. Yes.

Q. And the space from one edge of the saws over to the other edge is about thirty inches?

A. Thirty inches?

Q. Yes. The saws are about thirty inches across?

A. Yes, thirty-two. We cut ten and a half inch stick.

Q. Now, then, Pete, if that board laying in there and running through all right causing no trouble, and the rolls up, if you put your finger on it, or shove it around ever so little, it would come back at once, wouldn't it? A. You mean—

Q. I say, suppose the board lay on there running perfectly straight, straight grain, straight line, everything going all right, and it is between these saws, if you just shove over just a little bit it would go back at once, just twist one side to the other?

A. No, sometimes no, you see. [203—150]

Q. Would be almost sure to kick back wouldn't it? A. Yes, sir.

Q. In other words, anything that binds the board on the saws makes it fly, doesn't it?

A. Make fly.

Q. Yes, it will fly back whenever—

A. Kick back.

Q. It will kick back whenever the board binds on the saws, won't it? A. Yes, sir.

(Testimony of Pete Matesco.)

Q. And these rolls, any of these rolls either in front or behind, they are not always clean, are they?

A. Clean?

Q. They don't always always stay perfectly clean, do they? A. You mean get—

Q. Get sawdust?

A. Sawdust—yes—no, no, because we clean every noon.

Q. But in spite of all you can do there is a little pitch gets on them, and sawdust gets in the pitch and things like that? A. Yes, sir.

Q. So they are not dead flat?

A. Sometimes dead flat, sometimes not. Sometimes get a little pitch; full of pitch.

Q. So if a board is loose in the rolls, if the rolls not getting a good grip on it, like that, and if the roll has a little pitchy spot or sawdust collection, when it goes around it has a tendency to twist the board a little, doesn't it? A. No.

Q. Isn't this true, Pete, as a general proposition: If the rolls don't set right down solid on the board, they are apt to stop halfway through, aren't they? [204—151]

A. Stop?

Q. Yes. A. No—sometimes.

Q. Sometimes stop and sometimes go, don't they?

A. Sometimes stop and sometimes go.

Q. And the same thing is true about their kicking back; if the rolls don't come down solid, they are apt to kick back, aren't they?

(Testimony of Pete Matesco.)

A. No, not going to kick back of machine if no hot saw.

Q. Won't kick back on any occasion if the saw isn't hot? A. No.

Q. You were having—how often did you have trouble with these rolls not coming down before Simpson was hurt?

A. Oh, when the mill started it was one machine; when the mill started it didn't come right—didn't come right down.

Q. Kept sticking and sticking?

A. Kept sticking, once in a while sticking.

Q. And you had to have the steam-fitter come several times and fix it?

A. Oh, yes, maybe once a week or once in two weeks, when it needed it.

Q. And that kept up for several months, didn't it?

A. No—for several months. Simpson, he only worked two months.

Q. Then after Simpson was hurt you still had trouble with it? A. No, sir, working fine now.

Q. Been working fine ever since fixing up those valves?

A. No, no, steam man didn't come after Simpson got killed.

Q. When did the steam man come?

A. He never come afterwards; I never see. See —I didn't report any more. [205—152]

Q. You quit reporting when Simpson got hurt?

A. Because was working fine.

(Testimony of Pete Matesco.)

Q. It had quit having all this trouble before Simpson got hurt, had it? A. Yes.

Q. How long before? A. How long before?

Q. Yes.

A. I can't tell. Maybe one, two, five, weeks.

Q. You think just about one day, Pete?

A. I can't tell.

Q. You are still running the machine now, aren't you? A. Yes, I run that machine now.

Q. When you did have trouble with it how high would it be in the air there when it would stop and not come down, how high would those rolls be?

A. These rolls sometimes catch feed-roll and roll both.

Q. Sometimes banged together, wouldn't they?

A. Not now.

Q. They did sometimes didn't they?

A. No, working fine.

Q. Been working fine the last few months, haven't they?

A. The last two months, no. Don't tell me. I tell you so. They working fine.

Q. Yes, work all right now, isn't it?

A. Working right along.

Q. How long has it been since it kicked out a board? A. How long?

Q. Now.

A. A week ago. I don't know who was working. I don't know who was working the machine, was extra man, I was off, because [206—153] I worked three hours morning and three hours after-

(Testimony of Pete Matesco.)

noon; then extra edger-man he kick machine back. I was on top at head rig and I see machine kick back.

Q. You don't know what caused that?

A. I don't know; I didn't see; I seen machine kick back.

Q. Isn't it a general proposition of this kind, Pete, that there is something the matter with the machine, or is operated wrong, or it doesn't kick back? A. Every one kicked back.

Q. Every one if operated—

A. Every one kick back.

Q. How often did it kick back?

A. Maybe sometimes kicks once in six months; maybe sometimes kick once every month.

Q. How often had this one kicked back before Simpson was hurt?

A. That kicked back about a month before got Simpson killed.

Q. Hadn't it in fact been about as often as two times a day that a board would start in there and stop? A. Kick back?

Q. Many times not kick back? A. No, sir.

Q. Didn't you have a lot of boards there that you would start through the edger and they wouldn't go, they would stop halfway?

A. They wouldn't go? No want to go because lots of boards was cracked and you don't want to go through.

Q. Those rolls were not coming down solid, were they, to hold them on?

(Testimony of Pete Matesco.)

A. I tell you sometimes stick, sometimes not; what you ask me?

Q. I want to find out how often they stick. [207—154] A. That is it.

Q. How often would they stick; how often did they stick, when sticking, before Simpson was hurt?

A. How often?

Q. How many times a day?

A. Oh, sometimes it didn't stick once a week, and sometimes stick two or three times a day; sometimes stick once in two or three weeks. That is it.

COURT.—Had only been operated at the time Simpson was hurt—machine had only been operating for six weeks.

A. Six weeks?

Q. Yes.

A. I think about two months, six weeks; I don't know.

Q. You began the last day of July didn't you?

A. This mill started 9th of last July.

Q. Wasn't it the 31st day of July? A. 31st?

Q. Yes. A. No.

Q. He was hurt the 11th of September, wasn't he?

A. I don't know what day he was hurt, you see.

Q. So it hadn't been over about two months, had it? A. Yes, something like that.

Q. How do you fix in your mind the fact that you quit having trouble with it when he got hurt?

A. Me quit have trouble?

Q. Yes. You said working fine when he got hurt?

A. Was working fine that time too.

(Testimony of Pete Matesco.)

Q. How do you fix that in your mind? How do you remember [208—155] that so particularly?

A. How I remember?

Q. Yes.

A. You go edger about how it kick; I don't ask nothing about it, because edger can't speak, by God, like me and you.

Q. You like to talk too much and not listen.

A. I not like to talk no much. I don't like you asking many times, that is all.

Q. I want you to tell me how you come to fix in your mind, how it is that you remember that this trouble you had had with the edger had stopped when Simpson was hurt?

A. We got too many trouble.

Q. You had had trouble when it first started, hadn't you?

A. Yes, once in a while. Didn't I tell you stick?

Q. Yes, you told me that. When did that stop?

A. When did that stop?

Q. Yes. When did it quit doing that?

A. Maybe to-morrow—to-morrow it may be going kick back, I can't tell you. Machine can kick back any time.

Q. Now, then, do you know that the trouble you had had with that edger had stopped at the time Simpson was hurt? A. Had stopped?

Q. Yes.

A. One time kick four-inch cant and here is another cant what he got for the gang, and four-inch cant—

(Testimony of Pete Matesco.)

Q. You are not answering. A. No.

Q. I will have to give it up I guess. When it did kick back boards, did they always fly straight? [209—156]

A. Every one fly straight.

Q. Don't many of them fly off the side?

A. If he go on the side, board on the side, sometimes six foot stick, I mean wide; all right; then one piece is another side; he can kick on the side.

Q. They fly up in the air, they don't just roll along the rolls? Some of them go right up in the air?

A. Be some knots, or some piece like that, then go in the air. If board go in the air they go straight in line.

Q. What did you do then when Simpson was hit? What did you do; what was the first thing you did?

A. What did I do?

Q. Yes.

A. I was operating the machine.

Q. You saw Simpson get hit?

A. Yes, I seen him.

Q. You were standing here at the edger and Mr. Simpson was here. What did you do first?

A. I jumped and see Simpson; I see lots of blood there.

Q. Where did you go? Did you go up towards where he was?

A. No, no. I was in roll case. This roll case. I step in this roll case. You see I was there, I

(Testimony of Pete Matesco.)

step in this roll case and see Simpson from the roll case.

Q. How far down the roll case did you go?

A. About thirty feet.

Q. You got about thirty feet down the roll case?

A. Yes.

Q. And stood there and saw all the blood and everything? A. Yes.

Q. And the boys had gathered around him and were looking [210—157] at him?

A. I got no heart, you see, I can't see that.

Q. Were kind of sickened?

A. Just make me sick.

Q. Looked down around and went back to the edger? A. Yes.

Q. How long was it before you got back to the edger? A. About two minutes.

Q. Had they picked him up when you got back to the edger?

A. Yes, picked him up, you see; see was hit.

Q. You say the boys had picked him up when you got back to the edger?

A. I stay down by the edger when they pick him up.

Q. And then you looked at the saw and found it was hot? A. Yes.

Q. Was it real hot? A. No, saw real hot.

Q. Wasn't very hot? A. No.

(Testimony of Pete Matesco.)

Q. Not hot enough to make the saw weave, was it? A. No.

Witness excused.

Recess until two o'clock. [211—158]

Thursday, June 12, 1925, 2 P. M.

TESTIMONY OF T. A. COLEMAN, FOR DEFENDANT.

T. A. COLEMAN, a witness called in behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. KING.)

Where do you reside, Mr. Coleman?

A. Longview, Washington.

Q. Do you hold any official position there with any company?

A. I have been with the Longview Lumber Company ever since I have been out here, two and a half years.

Q. Long Bell Lumber Company, you say?

A. Yes, sir.

Q. Tell the jury what experience you have had with sawmill machinery and sawmills? How many years experience have you had?

A. I have had about fifty years.

Q. With what various machines has your experience been? What machines have you handled?

(Testimony of T. A. Coleman.)

A. Practically every machine that is in the sawmill.

Q. Did you ever design and construct a sawmill.

A. Yes, sir.

Q. What place was that?

A. Well, I have been with sawmills in Mississippi, Alabama, Texas, Louisiana.

Q. I didn't hear that last answer.

A. I was with sawmills in Texas, Louisiana, Mississippi, Alabama, and now in Oregon.

Q. Are you familiar with the machine known as a gang-edger [212—159] in a sawmill?

A. Yes, sir.

Q. Do you know how it operates? A. Yes, sir.

Q. Are you familiar with the Filer & Stovel gang-edger? A. Yes.

Q. How many years experience have you had with these?

A. Well, I have had experience thirty years or more.

Q. Are you familiar with the valves on the Filer & Stovel edger? A. Yes, sir.

Q. Mr. Coleman, I will hand you an object here, and will ask you to state what that is, if you know.

A. That is a valve on the left cylinder of the gang-edger.

Q. Can you just unscrew that there and show what is inside of it. That is the valve on the cylinder for the presser-roll, isn't it?

A. The lift cylinder that lifts the presser.

Q. Can you bring that piece out inside?

(Testimony of T. A. Coleman.)

A. I am trying to get it out now.

Q. That is the piece inside of it. Now, Mr. Coleman, while you hold this there, I direct your attention to a chart marked Defendant's Exhibit "C." I direct your attention to the little drawing up here in the upper left-hand corner. Do you know what that represents?

A. That represents this valve. Cross-section of it.

Q. Cross-section of the inside of the valve?

A. Yes.

Q. What is the little part in there shaded in red, what does that represent?

A. That is this valve here.

Q. Does it represent a cross-section of this at the end of [213—160] it or in the middle of it?

A. In the middle, right through here.

Q. Can you tell from looking at that drawing, where the steam comes in? A. Yes.

Q. Where does it come in?

A. Enters down through there.

Q. This valve is fastened on the cylinder here, isn't it? A. Yes.

Q. So when the steam comes in and comes down through here and up through there, over in here, it will be coming into the cylinder? A. Yes.

Q. How is the position of this center piece changed? How do you move to change that?

A. This hand lever here; it lifts that up to this position and opens it up.

(Testimony of T. A. Coleman.)

Q. When it is lifted up to this position the valve is in that position there?

A. The valve is in that position there.

Q. What do you do to let the steam out?

A. Just let go of this, or pull down there; supposed to drop down when let go of it; usually they push it down.

Q. When it is in the down position what position is the valve in then?

A. This port here covers that port there.

Q. The way it is shown in the drawing over on the right-hand side?

A. This port here covers that port there, and this opens and lets the steam or air out through there.

Q. What does the drawing represent over in the upper right-hand [214—161] corner there. What position is the valve in there?

A. Well, that is partly closed.

Q. Isn't it completely closed to let the steam out there?

A. No, this port here ought to be down past there.

Q. You think the drawing is not quite accurate?

A. No, that is right.

Q. So that steam comes out the cylinder over here through this channel here, and then goes out this exhaust?

A. Yes, that is it. That shows it right. Whatever air is in comes out through here and around down here.

Q. You use the word air?

(Testimony of T. A. Coleman.)

A. Or steam, either. Most of them operate by air nowadays. Used to in the old days use steam.

Q. Is there anything wrong with steam operation?

A. No.

Q. Now, there has been some testimony here about presser-rolls. Do you recognize on this Defendant's Exhibit "C" this chart where supposed to be a side view of the edger—can you tell which one of those rolls is the presser-roll?

A. That is the presser-roll.

Q. Is there more than one presser-roll?

A. There is one in front and one behind.

Q. Now when you lift up the lever there, what happens to the presser-rolls?

A. Lifts them up to this place.

Q. Lifts both of them up at once? A. Yes.

Q. What causes them to drop?

A. The pressure of steam or air coming in on top of this cylinder piston. [215—162]

Q. What does that do to the piston?

A. Press the piston down and leaves them up; the piston goes down and this—

Q. They say they can't hear.

A. The piston moves down and pushes on this fulcrum here and lifts these rolls.

Q. What do you do after the lumber is in the edger and you want to drop the presser-rolls down; how do you do that?

A. Push the lever down to this position; it will come, and it drops to that position.

(Testimony of T. A. Coleman.)

Q. What happens to the piston when the lever drops down that way?

A. The piston comes back to the top of the cylinder.

Q. What causes it to move back up there?

A. The weight of these rolls.

Q. Forces it back up. When the presser-rolls drop back down on the live rolls, is there any steam pressure that presses them down on the lumber?

A. None that I ever saw.

Q. Just tell about the construction of this cylinder there and piston. Is there any place for the steam to work on both sides of the piston?

A. Whatever I have seen, the cylinder is open end; nothing or no way for air or steam to have the pressure to push that piston up; same as your automobile cylinder.

Q. And the piston is caused to return to position by the weight of the presser-rolls when they drop down?

A. By the weight of the presser-rolls as they drop down.

Q. You are familiar with the Filer & Stovel gang-edger, are you? [216—163] A. Yes.

Q. Now, does the steam pressure press the rolls down on the lumber on these gang-edgers?

A. They do not.

Q. What holds the pressure of the rolls down on the lumber? A. Just the weight of the rolls.

Q. Now about what size are these presser-rolls on

(Testimony of T. A. Coleman.)

the big size Filer & Stovel gang-edger. How thick are they in diameter?

A. Well they are—at Longview are twelve inches in diameter. I don't know now over at Vernonia what they are, maybe ten inches; I don't know what they are.

Q. The testimony has been they are eight inches.

A. Well, maybe eight inches.

Q. I will ask you this further question. How are they constructed, presser-rolls? Are they solid iron or hollow?

A. Pipes with heads put in the ends of them; gas-pipe with cast-iron head in the end.

Q. How much would they weigh?

A. Taking frame and all—I don't know. I couldn't say just what they would weigh.

Q. Have no idea on that?

A. They would weigh three or four hundred, maybe more; maybe twice that much; I wouldn't say what they would weigh.

Q. How much did you say those would weigh?

A. Three or four hundred; maybe twice that much; five hundred. I wouldn't say what they would weigh. There is a big cast-iron yoke frame connected with them. Would be hard to say what they would weigh. [217—164]

Q. I don't think it is clearly understood, couldn't hear. Will you kindly describe the cylinder there again, so they can hear it, over here. About the construction of the cylinder at the bottom, how that is.

(Testimony of T. A. Coleman.)

A. Well the bottom of the cylinder is open end. Steam comes in the top and pushes down; connection to this point here and lifts these rolls. When the steam is let off the weight of the rolls, they drop down and push the piston back up to the top of the cylinder.

Q. Is there any steam that holds the presser-rolls down?

A. No, there is no steam that holds the presser-rolls down.

Q. And there is no chamber for the steam to get into that would press to hold them down?

A. Nothing at all. It is an open-end cylinder.

Q. Now, suppose a piece of lumber had started into the edger and that piece of lumber were thirty feet long and had gone through the edger at least twenty or twenty-two feet; would you say that the presser-rolls would have dropped clear down by that time and released the steam?

A. Well, if there was nothing to keep them from dropping down.

Q. Well, I presume that the lever was put down. Assume that the edger-man pulled his lever down.

A. If the edger-man pulled his lever down there is nothing to hold them up.

Q. And if there is nothing to hold them up what would happen to them?

A. They would come down on the lumber.

JUROR.—Did you ever have one stick? There has been testimony those valves stick. Have you ever seen one [218—165] stick in the cylinder?

(Testimony of T. A. Coleman.)

A. Never saw one stick coming down. Have seen them when they don't have steam pressure enough to lift them.

JUROR.—Was testimony here they stick coming down, and I wondered if you ever saw one that stuck. A. I never did.

Q. Mr. Coleman, do those edgers ever kick back, kick the lumber back?

A. I have seen pieces thrown out of the edger.

COURT.—What do you mean by thrown out?

A. The saws would catch them and they run—the lumber is traveling against the tooth of the saw, and if they catch on the back side of the saw it throws them out.

COURT.—You mean throws straight back?

A. Throws straight back.

COURT.—Would it do that if the pressure-roll was down? A. Yes.

Q. Does the mere fact that the presser-roll is down—is that any guaranty that they won't kick back? A. No, sir.

Q. Have you ever seen an edger that didn't kick back, that you worked around? A. Never have.

Q. Now you are familiar with the construction and layout of sawmills? A. Yes, sir.

Q. You are familiar with the position of the edger-tailer, the man known as the edger-tailer. Now, suppose that indicates the edger and the dotted lines are the level of the rolls leading up to the edger, and the level of the [219—166] tailer-table part of the edger, and this heavy line the floor of the

(Testimony of T. A. Coleman.)

sawmill as it goes up towards the edger, will you explain to the jury what rests on the level of the floor at the point of the edger?

A. That is the floor in front of the edger and that is the floor behind the edger. I don't know what drop they made in there, the floor there, but usually it is two feet; the one at Longview is thirty inches drop in the floor there; this man at the tail of the edger would be standing on the floor there thirty inches below the top of this line here.

JUROR.—Standing level with the main floor there? A. Level with this main floor.

Q. Would be standing on a suspended platform about like that; is that right? A. Yes, usually.

Q. Will you tell the jury how tall the Filer & Stovel edger is; how tall it stands above the floor on which it sets; how many feet?

A. This point in that floor to this is thirty inches.

Q. That is to the top of the rolls?

A. Top of the rolls.

COURT.—How far does the edger extend above that, to the cover at the top of the edger?

A. That part up there is something around thirty-six inches above this part.

Q. In other words, the top of the edger then is five and a half feet above the floor. Is that correct?

A. Yes.

Q. Have you ever had experience in and about the station [220—167] of the edger-tailer on the Filer & Stovel edger? Have you ever been around where he works in his position?

(Testimony of T. A. Coleman.)

A. Yes. Some of them stand plum at the far end, down around the floor where this floor is raised up again to that level, and some of them stand on the suspended floor, in the middle of the back edger-table.

Q. The edger-tailer stands there in his position on the Filer & Stovel edger, in the position indicated; could the edger-tailer see what took place in front of the edger? A. I don't think he could.

Q. What causes the pieces of lumber while coming through the edger and while the presser-rolls are down, what causes them to kick back?

A. Well, there is various causes for that; hot saw, that is spread and running apart; would get pressure enough on it to throw it back.

Q. What would happen if there was something there holding the lumber firm so it couldn't kick back?

A. I have never seen anything yet that would hold it so it wouldn't kick back.

Q. And will it kick back even if the presser-roll is down? A. Yes.

Cross-examination.

(Questions by Mr. MOULTON.)

It is much more apt to kick back if the presser-roll is not setting down solid, isn't it Mr. Coleman?

A. Well, possibly it would.

Q. Anything that permits the lumber to be swung from side [221—168] to side as it goes through

(Testimony of T. A. Coleman.)

the saw in the edgers, leads to the danger of kicking back, doesn't it?

A. Well, anything that would cause the lumber to catch the back side of the saw, saw teeth would catch in it.

Q. If the rolls were touching but only touching lightly then the lumber would have a tendency to be easily diverted from its course, wouldn't it?

A. I don't know.

Q. For instance, if was a little pitch or sawdust on the rolls, that coming over might shift the lumber off from the straight line, might it not?

A. Well, that wouldn't make—saws has to be either running bad or spreading, running apart so they make a hard pressure on the board—usually make a piece kick back—or sliver or broken piece that would catch the saw.

Q. Anything at all that lets the board bind on the saw will produce a probability that it will kick back, won't it? A. Well, yes.

Q. If the rolls don't come down good, if hard to get them down and they only touch it lightly, there is a great tendency for the boards to swing around as they go through, and kick back, isn't there?

A. Well, they kick back just as much from the edger that has nothing to hold the rolls up but the board, what they call the board-edger; no cylinder or nothing connected with it at all, but the pressure of the board running under the roll that holds it up.

(Testimony of T. A. Coleman.)

Q. Any other force than the board on that?

A. No edger ever I saw that had anything but the weight [222—169] of the roll to hold it down.

Q. You do know a great many of these steam cylinders used around sawmills, whether for edgers or what not, are constructed so they can take the steam from above and below the piston, are they not? A. I never saw one.

Q. Never saw the main saw log-deck that would do that? A. Yes.

Q. That is the same kind of a cylinder?

A. No.

Q. Just a steam cylinder with a port at each end?

A. A lifting cylinder on an edger is open at the bottom the same as an automobile.

Q. There are a great many steam cylinders used around a mill that receive steam from each end? A. Yes.

Q. And the force of the steam one way will drive it in one direction? A. Yes.

Q. And when you reverse or force the steam pressure the other way, will drive in the other direction? A. Yes.

Q. That is the way an ordinary steam-engine works? A. Yes, sir.

Q. And you use lots of those cylinders around a mill? A. Yes, sir.

Q. Where you want to drive a thing in one direction and then drive it back again?

A. Yes, sir.

(Testimony of T. A. Coleman.)

Q. But in this particular kind of an edger you think they use it only to drive down?

A. Yes, that is all.

Q. What is it that will make the roll stick and not come down freely? [223—170]

A. I don't know of anything if the operator throw his lever down and not hold it up, so that the steam is shut off from pressing down on the piston.

Q. Suppose you were in a mill and the edger-man came over and said, "My rolls won't come down." What would you think was the matter?

A. I wouldn't know until I examined it and saw.

Q. Wouldn't you first look to see if the valve would let the steam out of the top of the cylinder freely? A. Yes.

Q. And if the steam would not come out freely and promptly from the top of the cylinder, when the rolls started down, they would drive the piston up against that steam that was in there, wouldn't they?

A. I say, if the steam wasn't let out the top of the cylinder of course the rolls wouldn't come down.

Q. And that would be what would be the matter. There would be something the matter with the valves that the rolls wouldn't come down free, wouldn't there?

A. If the rolls wouldn't come down, there would naturally have to be something wrong with the valves.

(Testimony of T. A. Coleman.)

Q. And that would be the job of the steam-fitter, wouldn't it?

A. Well, it might not be for the steam-fitter; he might not understand the working of the valves; all he may know is how to screw a pipe in, or screw it out.

Q. Pretty poor steam-fitter.

A. Lots of steam-fitters don't know the working of valves.

Q. There isn't anything else that you know that would keep these rolls from coming down freely, but some defect in [224—171] *in* the valves. That is it, isn't it?

A. They would have to be. If the rolls didn't come down would have to be something to hold them up.

Q. Something wrong with the valve. You don't know of anything else that could do it, do you?

A. No.

Q. And if they didn't come down freely would it not thereby increase the danger of the boards flying back? A. I don't know as it would do that.

Q. Well, it would, wouldn't it?

A. Well, a few years ago there was no presser-roll on the front side of the edger.

Q. What was the reason they put one on?

A. To make it feed better.

Q. Just exactly that reason, wasn't it? Because there was so much damage done by boards binding on the saws and kicking back?

A. Made them feed better and faster.

(Testimony of T. A. Coleman.)

Q. And the subject of the boards kicking back in the edger has been the source of considerable trouble off and on a great many years?

A. They kick back when the edger didn't have anything to raise the rolls but the board passing under it. That is no steam cylinder connected with them at all.

Q. A reason for that is that roll is made light?

A. No, usually heavier; be no heavier according to size, than them rolls; some of them solid rolls.

Q. Isn't it true, Mr. Coleman, that wherever you run a circular saw, whether one or more, into a piece of timber, or whatever size it is, it is always an important matter [225—172] to make sure that that board or cant or log or whatever you saw with it, shall be firmly held in the line in which it starts against the saw? That is true, isn't it?

A. Well, the feed-rolls here on the bottom is all that guides and controls the board passing straight through the edger.

Q. Take the main saw, the ordinary main saw on the carriage. How do you hold the log in place there? A. On the carriage with the dogs.

Q. You dog it down solid? A. Yes.

Q. And you don't take a chance of its laying of its own weight on the saw, do you?

A. Oh, they do the heavy logs when flat side down. A number of times they never put a dog in it.

Q. If it is at all in shape it can move from one side to the other, it is apt to be thrown by the main saw, isn't it? A. It would in circular saw.

(Testimony of T. A. Coleman.)

Q. Any circular saw has a tendency to throw any lumber that is being sawed by it, that is permitted to swing around, as being driven against the saw, isn't it? A. Yes.

Redirect Examination.

(Questions by Mr. KING.)

Mr. Coleman, if the presser-rolls once start down would the exhaust in the valve have to be open before they start down?

A. Certainly the exhaust of the valve would have to be open before they would start down.

Q. Suppose the exhaust in the valve is open, so the presser-roll starts to fall. Is there anything in the Filer & [226—173] Stovel edger that would prevent it from going clear down?

A. Nothing that I know of.

Q. When you answered the question of Mr. Moulton to the effect that if the presser-roll stayed up there must be a defect in the valve, you meant to say that if they remained up in the air there was a defect in the valve?

Mr. MOULTON.—I object to that question as leading, argumentative—arguing with his own witness.

Mr. KING.—I withdraw that; that goes to the form of the question.

Q. I will ask, then, what you meant to say in answer to Mr. Moulton's question that there must be a defect in the valve if the presser-roll remained up?

(Testimony of T. A. Coleman.)

A. Well, they wouldn't necessarily need to be some defect in the valve. The operator might not have thrown his lever down to let the steam out of the top of the cylinder.

Q. Now, if he threw his lever part way down so that the valve was partly open, would the presser-roll come down?

A. If they started down at all they would come down.

Q. If they started down at all they would come clear down. Is that right? A. Yes, sir.

Recross-examination.

(Questions by Mr. MOULTON.)

Can't you conceive of such a situation, Mr. Coleman, as that the steam would be enough released that they would be brought part way down, but they wouldn't come down with their own weight?

A. If they started down at all that would indicate there was not enough pressure on the piston to hold them up. [227—174]

Q. There might be some pressure on the piston, partially holding them up, or retarding their downward course, and still not enough to lift them. That is true, isn't it? A. It could be true.

Redirect Examination.

(Questions by Mr. KING.)

If there is some pressure in there so as to retard their downward course, would it retard it for a period of time while a one-inch piece of lumber

(Testimony of T. A. Coleman.)

was going through the edger for a length of twenty-two feet? A. No, I don't think it would.

Q. How quick will a presser-roll drop if the valve is clear open? How much length of time?

A. Well, they will drop just as fast as the weight you would hold up and let go of it would drop to the floor. I don't know what speed that would travel.

Q. Did you ever see a presser-roll dropping slowly by retarded steam?

A. No, I don't know that I ever did.

Q. Now, suppose the roll at the time of the accident was down and touching the lumber. Would you say that any steam was then holding it up?

A. No, I wouldn't think would be any steam holding it up if it was down on the lumber.

Q. Would it be possible to touch the lumber and at the same time be held up by steam?

A. No, it wouldn't.

Recross-examination.

(Questions by Mr. MOULTON.)

Now, Mr. Coleman, do you really mean [228—175] that; it would be possible for it to stand at any point between its extreme downward point and its extreme upward point, and be held by steam, wouldn't it? A. No, not if down on the lumber.

Q. That operator can take his roll and put it wherever he wants it?

A. He can lift it up, but he can't put it down only by its own weight.

(Testimony of T. A. Coleman.)

Q. But he can stop it halfway up, can't he?

A. He would have to be an expert if he did.

Q. Can't he let in enough steam with that lever to stop it halfway up?

A. No, that is a hard thing to do. When you move that lever it goes clear up.

Q. Don't always go clear up every time?

A. If have pressure up it does.

Q. What makes it stand six inches up?

A. If he lifts his lever up there it would stand up in that position.

Q. That is, if he would hold his lever and let it drop back that far?

A. No, you can't do that. When you start it down it comes down.

Q. You can let off any amount of steam you want, can't you? You can, can't you? A. No.

JUROR.—Mr. Coleman, on these two ports here is it possible with a rotary valve to shut off both ports? What I mean, that long section, is it long enough to cover both ports of the valve; can he open the admission port and [229—176] hold it just open to let the steam in and bring that valve back to block both ports and hold the steam captive?

A. If he done that have to be very careful and move very slow until the rolls start to lift. That is a hard thing to do, to move the value and hold the rolls in any one position.

Q. You do realize, Mr. Coleman, that this part here used to slide back and forth and shut off the

(Testimony of T. A. Coleman.)

intake at one point and shut off the exhaust at the other is long enough that in one position it will take both intake and exhaust, don't you? You can see that on the map, can't you?

A. If the valve is properly made, when it closes this it has to open that.

Q. Let's see whether that is correct. Isn't it just as far in the little red part there I indicate with my knife, as it is in the open white part, at that part?

A. This drawing may show it, but when this point here closes, that has got to be open down here.

Q. If it closed clear over?

A. No, the instant that point there touches there, this is open here.

Q. Well, examine it here in this one. On both of these drawings doesn't it show that this part of the valve which closes the intake, in the one instance, or the exhaust in the other, is long enough that if it is stopped at the right moment it will close both intake and exhaust at the same time?

A. Well, this drawing might show it, but that shows it wide open. [230—177]

Q. Yes, that shows that one wide open and this end —to make it clear to you, this end, it has to be that way, hasn't it? A. Yes.

Q. Then this end has to be long enough that when it is turned over here, when this end slides over, this end will be fully covered?

A. When that point there touches that point there, that is open there.

(Testimony of T. A. Coleman.)

Q. Then when you bring it around in the position it is in now, they will both be open, won't they? It has either got to be long enough to close them both at one time, or it can't in any position close first one and then the other?

A. This has the whole width of that to close this port; only got the width of that to close this port and open that one.

Q. Without arguing the point, doesn't it show by both of these charts that there is a point in that red valve can be stopped, which will close both the intake and exhaust port?

A. It may show it on that chart, but a valve is not made that way.

Q. In other words, if it is made that way, it is defective, isn't it?

A. No. The valve is made when it closes the intake, the instant it closes that it opens this.

Q. You could stop that valve part way, couldn't you? A. You could.

Q. So that your intake port would be part open?

A. You could.

Q. And the same thing could be true of your exhaust port, [231—178] it would be partly closed?

A. Yes, you could have the exhaust port partly closed.

Q. Coming back to this proposition, you don't seem to have had much experience with rolls that would stick and not come down?

A. I never have had any experience—that I have

(Testimony of T. A. Coleman.)

had experience with them where couldn't get them up, but never had experience where wouldn't come down.

Q. If the operator of this edger has testified those rolls would stick and wouldn't come down, that is something you don't really know much about, isn't it?

A. Well, there could be cases that I never saw.

Q. Now, if they stick and don't come down freely, isn't it perfectly possible they might come down to a point where they just touched the board and don't bring any considerable pressure to bear on it; they are touching it enough to help feed it through and still not pressing on it with enough weight to hold it straight. Can't you conceive of such a situation as that?

A. The press-roll has nothing to do with holding the board straight.

Q. You don't think that the weight of these heavy rolls, three or four or five hundred pounds on these boards, when it stood on this edger, has anything to do with holding it straight? A. No, sir.

Q. Isn't is a fact that that is all they are there for, to hold it straight?

A. All they are there for is to put the pressure on to make them feed. [232—179]

Q. You don't care whether it goes straight or not?

A. They have nothing to do with making them go straight.

Q. What does make them go straight?

(Testimony of T. A. Coleman.)

A. The rolls that they are resting on, that they are traveling on.

Q. Do you think you can depend entirely upon the roll down here to make them feed straight?

A. Certainly you can.

Q. They have all sorts of things to deflect them, haven't they? A. No.

Q. Any little sliver under them, or any accumulation of sawdust and pitch, or anything like that on the rolls, would have a tendency to deflect them from a straight line, wouldn't they?

A. Well that is something; four feet from saw to to saw running fifty feet through the edger, and forty feet of it sticking out behind, traveling on the rolls, won't it hold that down?

Q. That is why you have those rolls heavy, isn't it?

A. No, sir; the weight of the rolls is to push them down to make it feed the cant through.

Q. Isn't it true you never undertake to operate any circular saw now without some device in connection with it which is calculated to hold the timber or lumber, whatever kind that is being cut, in a straight line?

A. The rolls that is traveling on holds in a straight line, but the rolls pressing on top of it has nothing to do with that. [233—180]

Redirect Examination.

(Questions by Mr. KING.)

Mr. Coleman, you didn't make the drawing there in evidence, did you, Defendant's Exhibit "C"?

(Testimony of T. A. Coleman.)

A. No, sir.

Q. Never saw that until you came into the court-room? A. Never did.

Q. Now could you fish out that inside piece again and hold it up and see the thickness of it? I understand you to say that is the operation of the inside of the valve; this large piece is not big enough and not in such position that it will close both the steam intake and steam outlet from the cylinder at the same time?

A. This part of this valve represents that part. It is not wide enough from here to here to cover that point and that point.

Q. I mean if the drawing were on the correct scale, it would not be wide enough?

A. No, to cover them two points.

Recross-examination.

(Questions by Mr. MOULTON.)

But Mr. Coleman, in regard to that same thing—we have been over it several times—if you held this valve—

A. There ought to be a line on the outside which shows the ports.

Q. There isn't any that will help at all. Well we will give that up. [234—181]

A. There ought to be a line there that shows the ports.

Q. You say it is possible to hold that valve so that at one time it is admitting some steam, but

(Testimony of T. A. Coleman.)

only a little; you could hold it in that position with your hand, couldn't you?

A. If a man can take time enough to move it slow enough, but he can't do it in quick operation.

Q. Can't do it in any quick operation?

A. No, sir, unless an edger-man is used to raising and lowering pressure rolls.

Witness excused. [235—182]

TESTIMONY OF IRA MANN, FOR DEFENDANT.

IRA MANN, a witness called in behalf of the defendant, being first duly sworn testified as follows:

Direct Examination.

(Questions by Mr. KING.)

Where do you reside?

A. Vernonia, Oregon.

Q. May I ask you how old a man you are?

A. Yes.

Q. How old? A. 58.

Q. How many years experience have you had in connection with sawmills and steam engineer?

A. Oh, that is different; I have been connected with sawmills for the last five or six years. Steam engineer, I have handled steam for over thirty-five.

Q. Are you acquainted with what is known as the Filer & Stovel edger in the Oregon-American Company mill there at Vernonia?

A. Not being edger-man, I am not.

(Testimony of Ira Mann.)

Q. Are you acquainted with the type of valve that is used on that edger? A. Yes.

Q. What would you call that valve?

A. I would call it a quarter-turn valve.

Q. Quarter-turn? A. Yes.

Q. Can you see the chart there, Defendant's Exhibit "C"? Do you recognize what it is up in the left-hand corner?

A. That is the valve and the jacket and the operation of it.

Q. What appears in the upper right-hand corner?

A. Same thing, only in the opposite position. [236—183]

Q. That is a cross-section of the center of the valve? A. Yes.

Q. Now, on this chart here, where is the valve located on this central part. Point that out.

A. Right in here.

Q. What is that arm sticking down there?

A. It is the operating lever that turns this quarter-turn valve.

Q. When the operating lever is up which one of these drawings up at the top represents the position of the valve—when the lever is up?

A. This one.

Q. When the lever is up?

A. No, this one here.

Q. Show now where the steam come in there.

A. Comes in right through here, down around through the center—through this opening in the side of the valve out through here and—

(Testimony of Ira Mann.)

Q. When the lever is moved down and the steam exhausts?

A. The exhaust steam comes back through the port in here. There are two ports in this. The cylinder is built like a pot, an inverted pot, no bottom to it; comes out through the under port and passes out through the lower opening in the valve and out into the exhaust line.

Q. Now, does the drawing in the upper right-hand corner indicate the position of the valve when the steam is exhausted within the chamber of the cylinder? A. Yes.

Q. Just describe that cylinder to the jury.

A. As I say, it is built just the same as a pot turned [237—184] upside down and the piston works from the bottom, connecting rod fastened into the bottom; connecting rod come down here fastened to this, pivoted on to this lever and raises the rolls up; that is the way of the downward movement.

Q. How is the cylinder at the bottom, open or closed?

A. Open, just the same as an inverted pot.

Q. What causes the presser-roll to raise?

A. What causes the presser-roll to raise? Steam, in this instance.

Q. I am referring of course to this edger. What cause it to come down? A. Its own weight.

Q. And when it comes down of its own weight what effect does that have on the piston?

A. The piston goes back up to the top of the

(Testimony of Ira Mann.)

cylinder again. It is close to the top that it will admit steam again for the next operation.

Q. In other words, the weight of the presser-roll forces the piston back into its original position?

A. Yes.

Q. Now, after it gets back into its original position, is there any steam applied from anywhere to press this presser-roll down onto the lumber?

A. Absolutely not.

Q. When a presser-roll once starts to come down and the steam is escaping through the exhaust, is there any way that presser-roll can be held up part way? A. Yes, sir.

Q. How is that? [238—185]

A. By having a heavier intake of steam than the discharge through the exhaust. In other words, by closing the valve so that the steam pressure will come on it with sufficient force to hold what—to hold it up there, faster than it will release through the exhaust.

Q. Is that possible with this kind of valve?

A. Any type of valve. If you will apply the live steam you can check the valve at any point of the stroke, by applying the live steam faster than you let the discharge or exhaust steam escape. In other words, you can form a cushion that you can control it there by.

Q. Now, will you state to the jury whether the intake and exhaust ports are the same size in a valve?

A. As near as I remember, they are.

(Testimony of Ira Mann.)

Q. They are both a fixed size in the valve itself, the way it is made, are they not? A. Yes.

Q. Now, will you just explain to the jury how it would be possible for more steam to be admitted through one port than would escape through the other?

A. By the aid of your lever, you open your live steam port to a heavier angle than your exhaust steam port will escape. That way it forms a cushion in your cylinder and you could check it anywhere you wanted. But it takes a fellow who knows his business to do it, I tell you that.

Q. Have to make a special effort to do that, wouldn't you? A. Naturally.

Q. Now, assuming that the presser-roll has once started to descend and is touching the lumber, would anything hold it in that position without letting it rest firmly on the [239—186] lumber?

A. I don't believe I understand the nature of your question.

Q. Suppose the edger-man left the presser-rolls down on top of the lumber so that it is touching the lumber. Is it possible to hold them there touching the lumber so that their full weight is not resting upon the lumber? A. I don't think so.

Cross-examination.

(Questions by Mr. MOULTON.)

It is as possible to hold them one sixty-second of an inch above the lumber as it is to hold them five inches, isn't it?

A. If you are smart enough you can do it.

(Testimony of Ira Mann.)

Q. If your valve just gets in the right position you will have it leaking steam in and letting steam out at the same time, won't you?

A. You can, yes. In other words, what is understood in engineering parlance, as bleeding.

Q. Yes. In other words, if the valve is bleeding it may be where supposed to release steam quickly when the lever is brought down; it may not do right at all? A. Yes.

Q. And they may just leave it in such state that unless you lift the lever up it won't actually lift the rolls but no matter where you put the lever there will alway be some pressure down on the piston. A. If you leave sufficient steam in, yes.

Q. But if your valve is bleeding— [240—187]

A. It would have to bleed pretty lively to do that, young man.

Q. Yes, it would be apt to be, maybe. If the rolls wouldn't come down freely it would mean the valves were bleeding, wouldn't it?

A. Yes, I would say so.

Redirect Examination.

(Questions by Mr. KING.)

There is another question, Mr. Mann, I forgot to ask you. What position do you hold with the Oregon-American Lumber Company at Vernonia?

A. I wouldn't—I don't know as I have any official position there.

Q. What kind of work do you do?

A. I see after the steam end of the mill.

(Testimony of Ira Mann.)

Q. Overlook the steam-line? Have you been called upon to adjust the valve of this edger?

A. I probably have been, a few times.

Q. Was that before Mr. Simpson was hurt?

A. No.

Q. How long after he was hurt, was it?

A. I haven't the least idea. I don't think I ever—I don't think I ever adjusted that valve more than once, maybe twice, in the last ten months.

Q. In the past how many? A. Ten.

Q. Ten months? A. Yes, sir.

Q. And would you say that the first occasion was a month after Mr. Simpson's accident, or how long?

A. I have no idea. [241—188]

Q. No idea at all? A. No, sir.

Q. Might have been one day? A. Sir?

Q. Might have been one month, you say?

A. It might have been.

(Questions by Mr. ILLIDGE.)

Do you remember the occasion of Simpson's injury? A. I do not.

Q. Were you at the mill at the time Simpson met his injury?

A. I was there, but not on that floor.

Q. You were working for the mill but not on that floor? A. No.

Q. And at the time you had charge of the steam-line? A. Yes.

Q. If there was anything wrong with this valve at that time, would you be called to remedy it?

(Testimony of Ira Mann.)

A. I certainly would, and it was not reported to me.

Q. You say it was not reported to you?

A. No, sir.

Q. Then do I understand that you were not called upon to make any adjustment of that valve immediately after Simpson's death?

A. Indeed not. I had no report as to its being out of order if it was, and had it been out of order I certainly would have been called on.

Recross-examination.

(Questions by Mr. MOULTON.)

You do know there was trouble with that valve, though, at some time? A. Do I know what?

Q. You know that they did have trouble with that valve, don't you? [242—189] A. No.

Q. Didn't you know that valve was in such shape that it wouldn't let the rolls down on the lumber freely? A. Not reported to me at that time.

A. When was it reported to you that the rolls were sticking?

A. Well, after Mr. Simpson was reported hurt to me, I guess a month, maybe longer than that, they reported to me that the rolls—that the cylinder wasn't acting right, and I went up and adjusted the valve.

Q. Adjusted it? A. Yes.

Q. So it would act right? A. Yes.

Q. But you don't remember how long that was after Simpson was hurt, do you?

(Testimony of Ira Mann.)

A. No, sir. To tell the truth I haven't much recollection of the time.

Redirect Examination.

(Questions by Mr. KING.)

Just what was that adjustment you made?

A. I moved these—there is a little set screw on this handle; by moving that set screw and turning the—you have a valve there, I will show you. Here is a pin that sets in the socket of the valve. By moving that handle on there you can adjust it so that it will close the port more or less. That is all there is to it. The edger-man in operating lots of times that screw may get loose and it requires adjustment from time to time. Any time that set screw gets loose on that rod it necessitates resetting that valve. [243—190]

Q. Resetting the valve on the inside?

A. Yes. Necessitates resetting it so it will close the port properly and open it to the proper position where when it is closed the exhaust ports will be well free, you see.

(Questions by Mr. ILLIDGE.)

Is it your duty, Mr. Mann, to look over that valve very often?

A. I never look at it unless reported to me.

Q. If reported out of order?

A. If reported out of order, then I look at it.

Q. Is it clear in your memory it was not reported to you out of order at the time of Simpson's injury? A. Absolutely.

Witness excused. [244—191]

TESTIMONY OF TROY SMITH, FOR DEFENDANT.

TROY SMITH, a witness called in behalf of the defendant, being first duly sworn testified as follows:

Direct Examination.

(Questions by Mr. ILLIDGE.)

Will you state your name—what is your age?

A. Forty-seven years, or about that.

Q. What is your occupation?

A. Saw mill foreman for the Oregon-American Lumber Company.

Q. At what place? A. Vernonia, Oregon.

Q. How long have you been sawmill foreman?

A. Ever since the mill started up.

Q. When was that?

A. Well, the date is something I don't know.

COURT.—The record shows July 8th.

A. I wouldn't dispute the fact when it started, for I really don't know. I was there a month before it started.

Q. What experience have you had in sawmill work?

A. I have been at it ever since I was big enough to work.

Q. Well, about how many years, do you believe?

A. Well, I could safely say twenty-five years, I could substantiate that.

Q. Are you familiar with the Filer & Stovel machinery? A. Yes.

Q. Have you worked in mills where Filer &

(Testimony of Troy Smith.)

Stovel machinery was installed, prior to working at the Oregon-American? A. Yes. [245—192]

Q. How many years experience might you have had with Filer & Stovel machines?

A. Sixteen years.

Q. And for that length of time would that cover edgers as well? A. No, sir.

Q. About how many years experience with edgers?

A. Eight years.

Q. About eight years experience where they had Filer & Stovel edgers? Mr. Smith will you please explain to the jury the operation of putting a board through the edger? Explain in your own way just the necessary moves that you make and what occurs. Refer to these diagrams if you desire.

A. Well, the chart there only shows the edger. The boards come down this roller case. A bumper on the roller case that stands up all the time unless —there is a pedal here and one here connected to the same lever. If there is a timber or slab coming down this roller case, coming on here, this fellow can put his foot here or here on this pedal and that bumper stays down until that timber or slab goes over, frees the bumper; he takes his foot off, and the bumper comes back up, standing there and that automatically—that being the edger—when this board hits that bumper there is skids in here or chains which handle the shaft under here; steam cylinder below. He has a pedal here and here and here, three pedals. If he is cutting anything under thirty-two foot lumber he will handle this pedal

(Testimony of Troy Smith.)

with this one. If cutting forty foot, of course, has to handle this back pedal, owing to the length that goes down there. That raises these skids and dumps out on this chain and running one set of them this way; and some pointers that raises about four inches, [246—193] setting up and catches this timber. When the edger-man wants to put that timber or board through the edger, he is standing there. He has a pedal there; he has two, —when he handles this chain and when he handles this. He presses that pedal and lowers the pointer and raises the chain, pulls this timber over. If not in line when them pointers raise—these chains running that way—he can pull it around until gets up to these pointers; lined up then to be admitted into the edger; raises his rolls and it goes through the edger.

Q. Now, what raises the rolls, what operation?

A. Well, there is a cylinder there. This is a lever. He raises this lever; that raises his roll to admit the lumber.

Q. And then what do these rolls do over here?

A. They are press-rolls.

Q. What do they do? What are their duties?

A. To hold the lumber down so it can be fed through.

Q. The upper roll, the presser-roll on each side of the edger—after the piece of lumber has passed, say, is held down by both rolls?

A. This one catches it before it hits the saw, gets to the saw. If this one is down that one is certain

(Testimony of Troy Smith.)

to be down. It catches it and carries it; a set of rolls behind keeps it going.

Q. State to the jury, if you know, whether the rolls are raised by steam or not?

A. They are raised by steam, yes, absolutely.

Q. And in what way are the presser-rolls let down?

A. They cut the steam off, cut the steam off and it releases [247—194] through that port, lets those rolls down.

Q. When they cut the steam off do I understand you to mean they move this lever down?

A. The edger-man always picks the lever up and holds it up like this, until the board or timber enters under these rolls. And he turns the lever loose and that lever comes on home, hangs down just about like that. There is a strap down there for it. The steam is cut off and released; while this board is going through them rolls are still up, and after this board goes through the rolls drop.

COURT.—Goes through what?

A. Goes through the edger. This board goes through, goes through the edger.

Q. Now, you say that he raises the lever, the edger operator raises the lever and raises the presser-rolls, the board enters the edger, then he drops the lever and leaves go of it, and it will come back of its own accord to close position?

A. Comes back down.

Q. Comes as far down as it is permitted to come,

(Testimony of Troy Smith.)

and when that comes down does that permit the roll, the presser-roll to come down on the timber?

A. The presser-rolls are already down; that weight on them. There is no steam holding them up, and stay that way and as this timber goes on through here and comes out the other side them rolls drop of their own accord.

Q. They drop first, do they, on the timber?

A. Yes. [248—195]

Q. And when the timber is entirely through they drop off the timber? A. Yes.

Q. How close do they come together?

A. Well, at the present time coming about three-eighths of an inch.

Q. Three-eighths of an inch. They never been down hitting the other rolls?

A. We have to take these rolls out and stretch them a little; they are swung; and an eighth of an inch on these rods here will take up about a quarter of an inch down there; a good deal further from here to that center, than from there to this center.

Q. Do you know whether a timber will go through the edger without the presser-rolls being down at all?

A. I don't know whether a timber will. I know a board will.

Q. What size, what dimensions?

A. One I can get through.

Q. What would be the largest you can get through?

(Testimony of Troy Smith.)

A. I can get—I know we can get six feet through a seven-foot edger.

Q. So a board one inch thick and seven feet wide, you say, would go through with how many saws cutting?

A. Well, he has six saws, has eight saws in that edger; the edger uses six saws.

Q. With eight saws cutting you can go through with boards, too?

A. I never tried that big. I have tried going through for twenty-four, but not above that.

Q. One to twenty-four, you have tried that?

A. Yes. [249—196]

Q. So that will go through?

A. Yes. Of course go through slow, doesn't go through fast.

Q. Feeds it faster with presser-rolls down. Mr. Smith, what causes the edgers to kick back?

A. In my opinion and experience there are three causes.

Q. Please state them.

A. One is hot saw; slivers getting in behind the guide.

Q. Any way to prevent that, that you know of?

A. No, sir I have never found any way.

Q. And the next cause?

A. That sliver heats your saw. The next cause, if a cant comes through with a round side, say something similar to this twenty-four inches, have three saws in that cant, one saw here, another saw here; this is a round side cant; when it comes there,

(Testimony of Troy Smith.)

cut the edge there to you; the other part of the saw back there; it might turn over and hit the side of that saw and come out.

Q. In other words, a slab try to swerve to one side and would break it?

A. It would turn over, wouldn't set up; would be heavier on the back and turn over. If that is eight inches and that saw ain't set over eight inches —that saw was six inches, and this cant is six, if it turned over in a quartering position it will hit that saw and the saw running, it will knock it up.

Q. If I understand, the edger-man in setting his saws, he wants to set his saws the proper distance so the saws, the other saws want to be set over to one side out of the way. Is that it? [250—197]

A. Usually that is the way.

Q. So they will not hit the edge that might be sticking out?

A. Any edge of the boards. He wants to get the end of the board going down there. He will want to—if he has an order for one by twelve clear, he will set the saw twelve inches to split off that board; and set the saw four inches, that is as close as you can set it; this one six inches; then maybe a two-inch strip on the outside; sometimes waste a piece inside the bark.

Q. You have one cause, the saws heating; another cause, where the edge might stick over far enough to hit the side of the saw. What is the third reason for kicking back?

A. Split up as running under—splitting and

(Testimony of Troy Smith.)

turning back under the board, throw back to the feed-roll.

Q. You are familiar with the construction of the Oregon-American Lumber Company's mill?

A. I am, yes.

Q. What is the drop—in the first place, does the edger itself set on the main floor level? A. Yes.

Q. Then is there a drop in the floor after it passes the edger? A. Yes.

Q. Do you know what that drop is?

A. I don't.

Q. Can you give a fair estimate of what that drop is?

A. Well, I estimate in my notion it would be eighteen inches. That is as near as I would come at estimating.

Q. Does the drop come in the floor right after it is past the edger? A. Yes.

Q. How soon after passing the edger? [251—198]

A. The drop—the edger floor comes out this way; the edger sets here; this drop comes down here; I would say eighteen inches right past the edger.

Q. Are you familiar with the edger-tailer's position? A. Yes, sir.

Q. In doing his work is he standing up straight or stooping over the table?

A. Well, he doesn't stoop much. I wouldn't say that he wouldn't stoop any. Ordinarily I think he stoops a little.

Q. From your knowledge of the condition there,

(Testimony of Troy Smith.)

in your opinion can the tailer man, the edger-tailer, see what is happening in front of the edger?

A. Well, he couldn't see low down, no.

Q. Well, what could he see? Have you ever occupied that position? A. No, sir.

Q. Have you been in front of the edger in the position of line-up man?

A. I never worked in that position. I am there every day, yes, some part there.

Q. When in that position, position similar to the one Mr. Simpson was in when he was injured, could you see the tailer of the edger?

A. I can by stepping sideways and looking down. You can see his head; but they usually look right side of the edger; the tailer does look down.

Q. Do I understand you can't look over the edger, you have to look to the side of it?

A. If you see him up to his head you would, yes, sir.

Q. Now, the tailer, he has a fixed position between the [252—199] rolls, has he not?

A. Yes, he has a position; he goes from one side of the rolls, goes to the other.

Q. Would it be possible for him in this position to look around the edger?

A. Yes, he can come over to this side, and his roller case is as wide as this edger, and look back there, if the edger-man was not in the way.

Q. How wide is his edger?

A. Well, it is seven foot inside the frame; I

(Testimony of Troy Smith.)

would say seven foot eight or ten inches would cover over all. That is an approximate estimate.

Q. The tailer's position is it about the center line of the edger, or more to one side?

A. He has two of these; double edger. The lumber comes from the gang on this side and from the head rig on this side. He stands in the middle, puts his slabs over the slasher, we will say thirty-two feet at least from the edger-tailer, and he can go on either side; if nothing in the way he usually stays in the center.

Q. If the edger-man is in the usual position in the center and the edger itself, the machine, is thirty-two feet from him, and he wants to see something directly back, or there is something happening directly back of that edger, and the edger is seven feet wide, isn't he looking over, or is he not looking on an angle?

A. The spotter always watches his edger.

Q. I am speaking of the tailer.

A. The tailer, I mean. He is always watching that edger. [253—200]

Q. Watching the edger itself?

A. Watching the edger-man and usually the edger. If he don't will get something run through him; it is dangerous.

Q. His position is a dangerous one?

A. Well, anybody that holds that position.

Q. Lots of opportunity to get hurt there?

A. Lots if you don't watch out.

Q. In other words, the tailer—the edger-tailer

(Testimony of Troy Smith.)

has to watch these boards coming through there pretty closely?

A. He watches every piece coming so he is out of the way, if one should get knocked crossways. I have never seen a tailer work in there a month that didn't have to climb out and get out of the way sometimes on account of a piece coming crossways; coming down he watches the edger and gets out; that is why he has to do it.

Q. This tailer has to watch these boards coming through pretty closely? A. Yes, sir.

Q. Particularly when a board is coming through?

A. Yes.

Q. Would he have to watch a board closely if a thirty-foot piece coming through and have twenty-eight or nine foot through?

A. Yes, the chances are it would be right down about here then.

Q. Would have to be watching that board, or not?

A. Sometimes they throw them off and still keep watching for the next one. He can look in any direction, and usually looks the way his lumber is coming, in fact all the time, I would say.

Q. You are acquainted with Nye? A. Yes. [254—201]

Q. Why did Nye leave his employment, do you know?

Mr. MOULTON.—I object to that.

COURT.—You ask him about that while on the

(Testimony of Troy Smith.)

stand. Suppose would be competent if he was discharged.

Mr. MOULTON.—All right. I withdraw the objection.

A. Mr. Nye left of his own accord, he and his brother. They told me going up in Idaho; the climate didn't very well suit him, and I had him work another day after he quit, to finish up the day. He left on good terms.

Cross-examination.

(Questions by Mr. MOULTON.)

What is the offset in the mill floor for?

A. For slasher; for slabs.

Q. It doesn't extend down to the tailer's station, does it? A. Yes, sir.

Q. The tailer, as he stands on that floor, is on the same level as the edger, isn't he?

A. Well, I will say the edger-man will be thirty inches; from the floor up here, would be thirty inches to the edger-man; about thirty-four inches to the top of the saw collar; these rolls below there are level; and then he is down, I will say, twenty-four to twenty-six inches. I wouldn't swear; would put him down—I think it would figure out were practically the same level. There might be a little difference.

Q. Just about the same. The picture here, Defendant's Exhibit "B," shows the situation, doesn't it? A. Well, it appears to. [255—202]

Q. There is a man blurred in the background of

(Testimony of Troy Smith.)

the picture there. Do you recognize that man standing there? Who is it?

A. I would have to study that.

Q. Isn't that a man in the background of the picture? It is blurred and dark.

A. Yes, that is the edger-tailer.

Q. That is the edger-tailer at his station, isn't it?

A. Yes.

Q. Now, let's point that out to the jury if we can see. So the fact of the matter is, the edger-tailer from his station can see and watch the edger-man and practically see all the edger-man's body, can't he?

A. If the edger-man on the side. You see that edger extends up a great deal higher than the saws. That man is in at least the middle of the edger.

Q. The edger-man's position as he operates the edger, is right by it, has to look the way the lumber comes in?

A. Yes, he is on the right of the machine.

Q. And it really doesn't interfere much—the edger doesn't interfere much with the view the edger tailer man has of the edger-man?

A. Unless the edger-man is setting saw. If he is, the tailer cant see.

Q. If in front to set the saws, then he would be out of sight of the edger-tailer. Is that right?

A. Yes, sir.

Q. Otherwise would be in plain sight of the edger-tailer all the time? [256—203]

(Testimony of Fred L. Nye.)

A. Because he is outside between them.

Witness excused.

Defense rests. [257—204]

TESTIMONY OF FRED L. NYE, FOR PLAINTIFF (RECALLED IN REBUTTAL).

FRED L. NYE, recalled in rebuttal, having been previously sworn testified as follows:

Direct Examination.

(Questions by Mr. MOULTON.)

Mr. Nye, is the station of the edger-tailer where you worked on any different level than the floor on which the edger-man stands?

A. No, it isn't. Not as near as you can see with the eye, it isn't.

Q. In your experience operating edgers, can you tell when the saw is getting hot?

A. You can if it starts to wobble.

Q. How do you tell, by seeing or hearing it?

A. Yes, can see when he goes to the edger to put in the timber.

Q. Can you hear it? A. No.

Q. Can you distinguish any difference in the sound? A. No, I can't, not whatever.

No cross-examination.

Witness excused. [258—205]

TESTIMONY OF CHARLIE FISHER, FOR PLAINTIFF (RECALLED IN REBUTTAL).

CHARLEY FISHER, recalled in rebuttal, having been previously sworn testified as follows:

Direct Examination.

(Questions by Mr. MOULTON.)

Have you ever had any experience with edger saws getting hot?

A. Well, I have been around them when getting hot, yes.

Q. Can you tell when getting hot?

A. They have a different hum when getting hot, than when running cool.

Q. Can you tell the sound of them when running hot? A. Yes, can tell the sound, at least I can.

Witness excused.

Plaintiff rests.

Defendant rests. [259—206]

Mr. KING.—At this time, your Honor, the defendant moves the Court for an order directing a verdict in favor of the defendant and against the plaintiff, upon the following grounds: First, that the plaintiffs have not offered any evidence tending to establish any of the charges of negligence alleged in the complaint. Second, that the plaintiffs have not proven their case sufficient to be submitted to the jury. Third, that the plaintiffs have not offered any evidence tending to prove or establishing that the negligence alleged in the complaint was the

direct and proximate cause of the injury to Claud Clyde Simpson, the deceased.

* * * * * * * * * * *

Argument of counsel.

Whereupon proceedings herein were adjourned until ten o'clock to-morrow morning. [260—207]

Monday, June 15, 1925. 10 A. M.

COURT.—In regard to the motion made for a directed verdict, in view of the conclusions that I have reached, it will be unwise and improper to comment or refer to the testimony, or my conclusions or any other conclusions that may be drawn therefrom. It is enough that in my judgment there is evidence sufficient to take the case to the jury upon the question of the defendant's negligence, whether the defendant was negligent as charged in the complaint, and if so, whether such negligence was the proximate cause of Simpson's injury, and the motion will be overruled.

Mr. KING.—Will your Honor kindly allow us an exception.

Argument to the jury. [261—208]

In the District Court of the United States, for the District of Oregon.

MABEL SIMPSON and WAYNE DEAN SIMPSON and JOYCE SIMPSON, Minors, by MABEL SIMPSON, Their Guardian Ad Litem,

Plaintiffs,

vs.

OREGON-AMERICAN LUMBER COMPANY, a Corporation,

Defendant.

INSTRUCTIONS TO THE JURY.

R. S. BEAN, District Judge:

Gentlemen of the Jury: This is an action brought by Mrs. Simpson and her children against the Oregon-American Lumber Company to recover damages for the death of the husband and father, which it is alleged was due to the negligence of the defendant company. The plaintiffs have alleged the particular negligence upon which they rely, and upon which they must recover in this case if they recover at all, and the negligence charged is that the defendant carelessly and negligently permitted the edger and the device for lifting the dead rolls to be out of repair and in a dangerous condition in this, that the valve admitting and releasing the steam into the cylinders for the purpose of operating the pistons and lifting the dead rolls, had been permitted to be and [262—209] remain in such condition through defect in the adjustment thereof that the same would not open and close freely, and that

when the steam had been admitted into the cylinders and the rolls had been lifted and the valves were released for the purpose of permitting the rolls to drop upon the lumber being cut in the edger, the valves would not properly release the steam from the pistons and the rolls were thereby left partially or completely lifted and were prevented from descending on the lumber with sufficient force to hold the same firmly in position to cause the same to be driven against the saw in a straight course, and such lumber was by reason thereof apt to stop while being driven against the saw, and to bind upon the saw, and to be thrown thereby with great force to the front part of the mill. That is the particular negligence charged in this complaint, and upon which the plaintiff seeks to recover. This is denied by the defendant company. The burden of proof is therefore upon the plaintiff to satisfy you by a preponderance of the evidence in the first place, that the defendant company was negligent in the particulars specified in the complaint. If they have failed to sustain such burden they are not entitled to a verdict. And by preponderance of the evidence I simply mean that they are required under the law to make out the best case on that question. If you believe the evidence is evenly balanced, then they have not satisfied the law, and the findings will have to be in favor of the defendant. [263—210]

Now, it is not necessary for the plaintiff to prove negligence beyond a reasonable doubt. This is a civil case, and all that is required of the party holding the affirmative of an issue is to satisfy the jury

by a preponderance of the evidence, by the burden of proof.

Now, the defendant is not an insurer of the safety of its employees. It does not guarantee that an employee will not be injured, and therefore there would be no ground for recovery and no right to recovery in this case if it appears from the testimony that this was a mere unavoidable accident for which no one was responsible, or if it was an injury or an accident for which the defendant was not responsible.

In order that the plaintiffs may recover therefore they must satisfy you by a preponderance of the evidence that the injury to the deceased was due to the neglect of some duty which the defendant owed to him, and the plaintiffs can only recover on the grounds of negligence alleged in the amended complaint, and those I have called to your attention.

If they have not satisfied you by a preponderance of the evidence that the defendant was guilty as charged, your verdict should be for the defendant, even though you should believe that there was negligence in some other respect. So that upon this matter of negligence the question is whether the valves on these edgers were defective as charged in the amended complaint, and if you are satisfied by a preponderance of the evidence that the valves were defective as charged, and that by reason of [264—211] such defect they would not permit the dead rolls to come down sufficiently on the lumber, then that would constitute negligence. But if you do not believe that the valves were defective in the manner

charged in the complaint, you would not be justified in finding in favor of the plaintiffs, even though you should think the edger-man or someone in charge of the edger was responsible for the injury. First you must find whether or not the valves were defective as charged in the complaint, and find that from the preponderance of the evidence.

If you do so conclude, then it will be necessary for you to determine whether or not the defective valves was the cause or the proximate cause of the injury to the deceased. The mere fact, if it is a fact, that the defendant company was negligent in allowing the valves to get out of repair, if they were out of repair, would not justify a verdict in favor of the plaintiffs, unless it further appears that that defect was the proximate cause of the injury. And by proximate cause I simply mean a cause which in its natural sequence produces the injury, and which ought to have been foreseen by a person of ordinary prudence as likely to produce an injury. There must be a causal connection between the negligence and the injury in order to justify a recovery.

And again, if it appears from the testimony in the case that the injury to Simpson was due wholly to his own fault, then of course these plaintiffs would not be entitled to recover at all. And what I mean by that is [265—212] this: Under the law upon which this case is being tried, what is known as contributory negligence is not a defense, but under certain circumstances and when pleaded, may be taken into consideration by a jury in estimating the amount of damages, but contributory

negligence presupposes negligence of both parties. It means that the defendant is negligent and that the plaintiff is negligent—the deceased is negligent. And therefore what I mean in this last charge is that if it appears that the defendant was not negligent as charged in the complaint, but that the injury to Simpson was due to his own negligence or his own carelessness, of course the plaintiffs would not be entitled to recover, because they have not sustained the allegations of the complaint, and have not shown to the satisfaction of the jury that the injury to Simpson, from which he died, was due to the negligence of the defendant company, or it was not the proximate cause of his injury.

Now, then, if you conclude from the preponderance of the evidence that the defendant company was negligent as charged in the complaint, and that the valves were in fact out of order, and by reason of that fact the rolls would not come down solidly upon the lumber that was passing through the saw, and that by reason of that fact the injury from which the deceased died, occurred—I say if you find these issues in favor of the plaintiffs, then it will be necessary for you to determine the amount of the damages which they should recover in this case. Now there is no hard-and-fast rule the Court can give you or state to you, by which you should be governed in arriving [266—213] at a conclusion as to the amount of the damages. When it comes to a question of measure of compensation for a personal injury or for the death of an individual, there is no rule of law, no fixed standard by which a jury

can be guided, and therefore the matter is left to the sound judgment and discretion of the jury. That is the only way the law recognizes or known to the law by which such questions can be determined. In this case the rule of law covering the measure of damages is that it must be limited to the net amount which Simpson would probably have saved from his earnings in his trade or work, taking into consideration his age, health, ability, habits of industry and mental and physical ability as far as they affected his capacity for earning money and rendering service to others, or accumulating property. The question of pain and suffering, if any, that he may have sustained after the injury and prior to his death, is not to be taken into consideration, nor are you to be influenced in any way by sympathy which you may have for his family, for his widow or his minor children. These matters are not to be considered by a jury in determining the amount of recovery in this character of case, but it is simply what you may think, under all the evidence, would be, as the Supreme Court of this state puts it, "the net amount which he would probably have saved from his earnings, taking into consideration his age and his earning capacity and his probable length of life," and from all of it [267—214] determine what you can say you think would be a fair recovery in this case. And that is the best I can do in advising you as to the rule by which you shall be governed in arriving at your verdict, if you reach the question of damages. It should be based on the real substantial evidence in the case, and should be

such sum as would be a fair compensation for the life of the deceased, the net result of his work during his probable life.

Now, you are the exclusive judges of all questions of fact in this case. You are the exclusive judges of the credibility of the witnesses.

The Court overruled a motion for a directed verdict in your presence. You are not to conclude from that that in the judgment of the Court the plaintiffs are entitled to recover. That motion simply raised the question of law as to whether there had been any evidence sufficient to submit this case to the jury, but the Court did not undertake to decide any disputed fact in the case, because it has no right to do so. It has no more right to invade your province and undertake to determine a question of fact, than you have to invade its, and determine questions of law. The responsibility of the conclusion in this case rests with the jury and not with the Court.

Now, something has been said about the State Compensation Law. Under that law employers are permitted or are allowed, if they so elect or so desire, to elect not to contribute to and come under the provisions of the act. If they do so elect, then they are liable in cases of this [268—215] character and are deprived by the law of certain defenses which it is not necessary to state here. This case is to be determined upon the facts and the evidence as given on the trial, and the law as given to you by the Court, regardless of the fact that it has elected not to come under the Compensation Act.

That is a privilege accorded by law, and when it made such election the defendant is entitled to have this case tried upon the issues and law as presented.

Jury retires. [269—216]

In the District Court of the United States, for the District of Oregon.

MABEL SIMPSON and WAYNE DEAN SIMPSON, and JOYCE SIMPSON, Minors, by MABEL SIMPSON, Their Guardian ad Litem.

Plaintiffs,

vs.

OREGON-AMERICAN LUMBER COMPANY, a Corporation,

Defendant.

I, Mary E. Bell, hereby depose and say that I acted as official reporter for the trial of the above-entitled case in the above-entitled court, on the 11th day of June, 1925 et seq., and that I took down in shorthand all of the testimony, motions and rulings at said trial and that the foregoing is a full, true and accurate transcript thereof, as I verily believe.

[Seal] MARY E. BELL,
Notary Public for Oregon.

My commission expires March 19, 1929. [270]

CERTIFICATE OF JUDGE TO BILL OF EXCEPTIONS.

The foregoing bill of exceptions contains all the evidence upon the trial of this action and relating

to the foregoing exceptions, and that the exhibits be deemed a part of the bill of exceptions and be attached hereto.

The attorneys for the plaintiff in error, the defendant below, having thereupon tendered this as defendant's bill of exceptions to the rulings of the Court upon the trial of this action, and having requested that the signature and seal of the trial Judge aforesaid should be annexed to the same pursuant to statute in such case made and provided, and forasmuch as none of such matters and exceptions so offered and made to the rulings and directions of said Judge, and none of the evidence and other things do appear on the record of said case, the said Judge, pursuant to said request, did put his signature and seal to this bill of exceptions this 24th day of July, A. D. 1925, and orders the same placed on file.

(Sgd.) R. S. BEAN,
Trial Judge.

District of Oregon,
State of Oregon,
County of Multnomah,—ss.

Service of the foregoing bill of exceptions is hereby admitted by the receipt within the district, state and county aforesaid of a duly certified copy this 24th day of July, A. D. 1925.

WM. P. LORD,
One of Attorneys for Plaintiffs. [271]

Filed July 25, 1925. G. H. Marsh, Clerk.

AND AFTERWARDS, to wit, on Thursday, the 27th day of August, 1925, the same being the 46th judicial day of the regular July term of said court,—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [272]

In the District Court of the United States for the District of Oregon.

No. L.–9520.

August 27, 1925.

MABEL SIMPSON et al.,

vs.

OREGON-AMERICAN LUMBER COMPANY.

MINUTES OF COURT—AUGUST 27, 1925—ORDER DIRECTING FORWARDING OF ORIGINAL EXHIBITS.

Now, at this day on application of the attorney for defendant, it is ORDERED that the original exhibits introduced in evidence at the trial of this cause be forwarded by the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit as a part of the transcript of record on writ of error in said cause.

CHAS. E. WOLVERTON,
Judge.

Filed August 27, 1925. G. H. Marsh, Clerk. [273]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, pursuant to the annexed writ of error and in obedience thereto, do hereby certify that the foregoing pages, numbered from 7 to 273, inclusive, constitute the transcript of record upon said writ of error in a case in said court in which Mabel Simpson, and Wayne Dean Simpson, Earl Simpson and Joyce Simpson, minors, by Mabel Simpson, their guardian *ad litem* are plaintiffs and defendants in error, and Oregon-American Lumber Company, a corporation is defendant and plaintiff in error; that the said transcript has been prepared by me in accordance with the praecipes for transcript filed by said plaintiff in error and by defendants in error and is a full, true and complete transcript of the record and proceedings had in said court in said cause, in accordance with the said praecipes, as the same appear of record and on file at my office and in my custody.

I further certify that the cost of the foregoing transcript is $43.50 and that the same has been paid by the said plaintiff in error.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Portland, in said district, this 27th day of August, 1925.

[Seal] G. H. MARSH,
Clerk. [274]

[Endorsed]: No. 4680. United States Circuit Court of Appeals for the Ninth Circuit. Oregon-American Lumber Company, a Corporation, Plaintiff in Error, vs. Mabel Simpson and Wayne Dean Simpson, Earl Simpson and Joyce Simpson, Minors, by Mabel Simpson, Their Guardian *ad Litem,* Defendants in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Oregon.

Filed August 31, 1925.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

4580

In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

OREGON-AMERICAN LUMBER COMPANY, a corporation,
Plaintiff in Error,
vs.
MABEL SIMPSON and WAYNE DEAN SIMPSON, EARL SIMPSON and JOYCE SIMPSON, minors, by MABEL SIMPSON, their guardian *ad litem*,
Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR

Upon Writ of Error to the District Court of the United States for the District of Oregon.

Names and addresses of the Attorneys of Record:

W. LAIR THOMPSON,
RALPH H. KING,
Northwestern Bank Building, Portland, Ore., for Plaintiff in Error.

LORD AND MOULTON,
Spaulding Building, Portland, Ore., for Defendants in Error.

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FOR THE NINTH CIRCUIT

OREGON-AMERICAN LUMBER COMPANY, a corporation,
Plaintiff in Error,
vs.
MABEL SIMPSON and WAYNE DEAN SIMPSON, EARL SIMPSON and JOYCE SIMPSON, minors, by MABEL SIMPSON, their guardian *ad litem*,
Defendants in Error.

STATEMENT OF FACTS.

On the 11th day of September, 1924, Clyde C. Simpson, while employed by the defendant in its lumber mill at Vernonia, Oregon, was struck by a piece of lumber which was kicked back from one of the edgers. Medical attention was promptly given but the wound became infected and as a result thereof Simpson died on October 29, 1924.

The present action was instituted by Simpson's widow and children as plaintiffs to recover damages for his death under the provisions of the Employers' Liability Law of the State of Oregon, sections 6785 to 6790 inclusive, Oregon Laws. Under the provisions of section 6788,

Oregon Laws, as amended by the Laws of 1921, page 38, the cause of action for death resulting from the violation of any of the duties imposed upon employers by the Employers' Liability Law vests in the widow and children. Section 6788 further provides that the amount of damages recoverable in such an action is unlimited. Section 380, Oregon Laws, provides that the right of action for death resulting from negligence other than a violation of duties enjoined by the Employers' Liability Law vests in the administrator and recovery of damages is limited to $7,500.00. Section 380, Oregon Laws, was enacted in 1862 and has stood upon the statute books since that time unmodified with the exception that in 1907 the amount of damages which the original enactment limited to $5,000.00 was increased to $7,500.00. The Employers' Liability Law of Oregon was first enacted in 1911.

The negligence charged against the defendant in the amended complaint is contained in the allegations of paragraphs V and VI, which are as follows:

V.

"That in and about its said mill the defendant lumber company employed a certain system of live rolls used for the purpose of conveying lumber from one part of its plant to another, and a certain machine known as a gang edger which consisted of a set of saws operated on a common drum or arbor, each saw being about thirty inches in

diameter and about three-eighths of an inch thick, and said saws were so arranged that when large pieces of lumber were propelled against the same, said pieces would be cut at the same time by several of said saws, thereby dividing such lumber into several pieces; for the purpose of driving the lumber against said saws there were in connection with said machine certain live rolls which were caused to revolve by gears driven by steam power, *and the lumber to be cut by said saws was put upon said live rolls and thereupon a set of rolls not operated by gears, known as dead rolls, were lowered upon such lumber to hold the same firmly in position so that said live rolls could drive the same against said saws in a direct course; that said dead rolls were held down upon such lumber by a weight of about five hundred pounds, and said machine was equipped with an arrangement of steam operated cylinders and pistons into which steam was admitted by means of valves for the purpose of lifting said dead rolls from said lumber when necessary to admit pieces of lumber into said machine;* said edger saws were driven at the rate of about 1800 to 2000 revolutions per minute, and were propelled with such terrific force that in the event lumber was permitted to be driven against the same in an irregular or uneven course, or to shift from side to side while being driven against the same, there was

great and imminent danger that such lumber would bind upon said saws and would thereupon be thrown by said saws to different points in and about said mill, with great danger to the employes engaged in said mill, *and it was therefore necessary that the valves admitting steam into the cylinders operating said pistons be so adjusted that the same would admit steam into said pistons promptly for the raising of said dead rolls and that when required to do so by the operator of said edger, would release the steam in said cylinders promptly and completely so as to permit the full force of the weight of said deal rolls to bear upon the lumber being sawed by said edger, so that the same might be held firmly in place and projected against said saws in an even course, and not permitted to change the course at which it started against said saws.*"

VI.

"That on and prior to said 11th day of September, 1924, said defendant had carelessly and negligently and in violation of Section 6785, Oregon Laws, *permitted said edger and said device for lifting said dead rolls to be out of repair and in a dangerous condition in this: that the valves admitting and releasing the steam into said cylinders for the purpose of operating said pistons to lift said dead rolls had been permitted to be*

and remain in such condition through some defect in the adjustment thereof which plaintiffs cannot particularly specify, but with which defendant is well acquainted, so that the same would not open and close freely, and that when the steam had been admitted into said cylinders and said rolls had been lifted, and the said valves were released for the purpose of permitting said rolls to drop upon lumber being cut in said edger, the said valves would not promptly release the steam from said pistons and said rolls were thereby kept partially or completely lifted and were prevented from descending on said lumber with sufficient force to hold the same firmly in position, and cause the same to be driven against said saws in a straight course, and such lumber was by reason thereof apt to stop while being driven against said saws and to bind upon said saws and to be thrown thereby with great force to other parts of said mill."

The original complaint filed in the present action embodied an additional charge of negligence which was set out in paragraph IX thereof in the following language: "and thereupon the operator of said gang edger, who was an employe of defendant, carelessly and negligently repeatedly lifted the said dead rolls and dropped the same and released the pressure upon said lumber and permitted the same to be loose upon said power driven lower rolls."

A motion was filed by the plaintiff in error to strike out the above allegation upon the ground that the same "consists of common law negligence, for which no right of action exists in favor of the surviving widow and children." This motion was granted by the court below (Judge Wolverton sitting), and thereupon the plaintiffs filed their amended complaint, which omitted such allegation.

Upon the close of the evidence the plaintiff in error interposed a motion for a directed verdict in its favor. This motion was denied by the court below and the cause was submitted to the jury. From a judgment entered in favor of the defendants in error for $15,000 the present writ of error is prosecuted.

Specification of Errors

The plaintiff in error has assigned as error, the action of the District Court of the United States for the District of Oregon in denying and overruling the motion of the plaintiff in error for a directed verdict in its favor, which motion was as follows:

> "At this time the defendant moves the court for an order directing a verdict in favor of the defendant and against the plaintiff, upon the following grounds: first, that the plaintiffs have not offered any evidence tending to establish any of the charges of negligence alleged in the complaint. Sec-

ond, that the plaintiffs have not proven their case sufficient to be submitted to the jury. Third, that the plaintiffs have not offered any evidence tending to prove or establishing that the negligence alleged in the complaint was the direct and proximate cause of the injury to Claud Clyde Simpson, the deceased."

Brief of Argument

1. Plaintiffs can recover only upon the negligence charged in their amended complaint. This is the rule asserted in cases involving common law negligence.

Woodward v. O. R. & N. Co., 18 Or. 289, 293.

Knahtla v. O. S. L. Ry. Co., 21 Or. 136, 142.

Kincaid v. O. S. L. Ry. Co., 22 Or. 35, 39.

Lieuallen v. Mosgrove, 33 Or. 282, 286.

Sullivan v. Wakefield, 59 Or. 401, 407.

Holmberg v. Jacobs, 77 Or. 246.

Bamford v. Van Emon Elevator Co., 79 Or. 395.

(a) The same rule has been enforced in actions brought under the provisions of the Employers' Liability Law of Oregon, Sections 6785-6790, inclusive.

Dorn v. Clarke-Woodward Drug Co., 65 Or. 516, 520.

Schaller v. Pacific Brick Co., 70 Or. 557, 568.

Heiser v. Shasta Water Co., 71 Or. 566, 571.

McClaugherty v. Rogue River Elec. Co., 73 Or. 135, 147.

Land v. Camden Iron Works, 77 Or. 137, 150.

Wolsiffer v. Bechill, 76 Or. 516, 526.

Camenzind v. Freeland Furniture Co., 89 Or. 158, 181.

Rorvik v. North Pacific Lumber Co., 99 Or. 58.

2. The proof offered by the plaintiffs must establish that the negligence charged in their amended complaint was the proximate cause of the injury.

Chambers v. Everding & Farrell (1914), 71 Or. 521, 531.

Knauff v. Highland Development Co., (1913), 68 Or. 93, 95.

Buchanan v. Lewis A. Hicks Co., (1913), 66 Or. 503, 507.

Brown v. O.-W. R. & N. Co., (1912), 63 Or. 396.

(a) The foregoing rule is enforced with respect to actions instituted under the Employers' Liability Law of Oregon.

Vanderflute v. Portland Ry., Light & Power Co., (1922), 103 Or. 398, 404.

3. A cause of action for death not resulting from violation of Employers' Liability Law vests in the personal representative of the deceased.

Section 380, Oregon Laws.

Graham v. Bowman-Hicks Lumber Co., Decided by District Court of the United States for the District of Oregon (unreported).

4. The jury cannot speculate as to the cause of the injury and where the evidence is such that the jury is left to speculation as to the cause of the damage or injury complained of, plaintiffs cannot recover.

Holmberg v. Jacobs, (1915), 77 Or. 246-253.

Spain v. Oregon-Washington R. & N. Co., (1915), 78 Or. 355-369.

Medsker v. Portland Ry., Light & Power Co., (1916), 81 Or. 63-69.

Bridenstine v. Gerlinger Motor Car Co., (1917), 86 Or. 411-426.

Stevens v. Myers, (1919), 91 Or. 114-117.

5. In determining whether the plaintiffs produced sufficient evidence in support of the charges of negligence to warrant the submission of their case to the jury, the jury is not permitted to found an inference upon an inference or base an inference upon a presumption.

Deniff v. Charles R. McCormick & Co., (1922), 105 Or. 697, 704.

State v. Hembree, 54 Or. 463.

Stamm v. Wood, 86 Or. 174.

State v. Rader, 94 Or. 432, 456.

6. It is the policy of the State of Oregon to limit the recovery of damages for death resulting from negligence.

Section 380, Oregon Laws.

7. No recovery can be had in an action instituted under the Employers' Liability Law for common law negligence.

Section 380, Oregon Laws.

Graham v. Bowman-Hicks Lumber Co., Decided by the District Court of the United States for the District of Oregon, (unreported).

ARGUMENT

No Evidence That Alleged Negligence Was Proximate Cause of Accident.

It is appellant's contention that its motion for a directed verdict should have been sustained for the reason that no evidence was presented that the negligence alleged in the complaint was the proximate cause of the injury to Clyde C. Simpson, the deceased. If no such evidence appears in the record the case presented by the plaintiffs was insufficient to justify its submission to the jury.

No extensive citation of authorities is required in support of the proposition that the plaintiffs can recover only upon negligence charged in the complaint. This is the rule in actions at common law in the State of Oregon.

Woodward v. O. R. & N. Co., 18 Or. 289, 293.

Knahtla v. O. S. L. Ry. Co., 21 Or. 136, 142.

Kincaid v. O. S. L. Ry. Co., 22 Or. 35, 39.

Lieuallen v. Mosgrove, 33 Or. 282, 286.

Sullivan v. Wakefield, 59 Or. 401, 407.

Holmberg v. Jacobs, 77 Or. 246.

Bamford v. Van Emon Elevator Co., 79 Or. 395.

The same rule controls actions brought under the Employers' Liability Act. Plaintiffs can recover only on the negligence or omissions which are charged in their complaint.

Dorn v. Clarke-Woodward Drug Co., 65 Or. 516, 520.

Schaller v. Pacific Brick Co., 70 Or. 557, 568.

Heiser v. Shasta Water Co., 71 Or. 566, 571.

McClaugherty v. Rogue River Elec. Co., 73 Or. 135, 147.

Land v. Camden Iron Works, 77 Or. 137, 150.

Wolsiffer v. Bechill, 76 Or. 516, 526.

Camenzind v. Freeland Furniture Co., 89 Or. 158, 181.

Rorvik v. North Pacific Lumber Co., 99 Or. 58.

The plaintiffs must produce evidence that the negligence charged in the amended complaint was the proximate cause of the injury for which recovery is sought in the present action. This was the rule asserted in the cases where the recovery was sought for common law negligence.

Chambers v. Everding & Farrell, (1914), 71 Or. 521, 531.

Knauff v. Highland Development Co., (1913), 68 Or. 93, 95.

Buchanan v. Lewis A. Hicks Co., (1913), 66 Or. 503, 507.

Brown v. O.-W. R. & N. Co., (1912), 63 Or. 396.

While the Employers' Liability Law of Oregon has imposed a higher requirement of care upon employers, the rule is that the plaintiffs' evidence must establish that the negligence complained of was the proximate cause of the injury.

Vanderflute v. Pt. Ry. Light & Power Co., (1922), 103 Or. 398, 404:

> "While the employers' liability law has made more stringent requirements respecting the duty of employers and has abolished the doctrine of negligence of fellow-servants in certain circumstances together with the defense of contributory negligence, it has not changed the rule that the carelessness complained of must be the proximate and not the secondary cause of the injury."

In an earlier portion of our brief (see pages 2 to 5) we have quoted in full the two paragraphs of the amended complaint which contain the allegations of negligence. The whole charge of negligence is embodied in the following allegation set out in paragraph VI of the amended complaint:

> ". . . said defendant had carelessly and negligently and in violation of Section

6785, Oregon Laws, permitted said edger and said device for lifting said dead rolls to be out of repair and in a dangerous condition in this: *that the valves admitting and releasing the steam into said cylinders for the purpose of operating said pistons to lift said dead rolls had been permitted to be and remain in such condition through some defect in the adjustment thereof which plaintiffs cannot particularly specify, but with which defendant is well acquainted, so that the same would not open and close freely, and that when the steam had been admitted into said cylinders and said rolls had been lifted, and the said valves were released for the purpose of permitting said rolls to drop upon lumber being cut in said edger, the said valves would not promptly release the steam from said pistons and said rolls were thereby kept partially or completely lifted* and were prevented from descending on said lumber with sufficient force to hold the same firmly in position."

Under the authorities discussed hereinabove the plaintiffs must produce evidence to the effect that the negligence which is alleged in the amended complaint is the direct and proximate cause of the injury. In the absence of such evidence the case should be withdrawn from the jury.

The plaintiffs produced but one witness who saw the accident to Simpson. The testimony of

this witness as to the action of the dead rolls at the time of the accident is nowhere controverted in the record. Fred Nye was the eye-witness of the accident produced by the plaintiffs and he testified as to the manner in which the accident occurred. For the convenience of the court in reviewing the testimony of this witness we deem it advisable to quote all the testimony of the witness Nye pertaining to the occurrences at the time of the accident to Simpson:

Testimony of Mr. Nye.

Q. Now then Mr. Nye, these rolls over here, are they stationary, these top rolls that you have said are dead rolls, or can they be swung up and down?

A. These top rolls?

Q. Yes.

A. They can be lifted up by steam lever or throttle he has there.

Q. The edger man has a throttle?

A. Has a throttle; he raises these rolls up when he puts a timber in.

Q. Overhead is what in relation to the steam?

A. Steam pipes.

Q. Over the top, what is up there, on each side? Is there a cylinder up there?

A. There is, yes.

Q. Where is the valve connected with that cylinder, do you know?

A. Right on top, right closer to the top.

Q. What operates that valve?

A. Steam does.

Q. *Who has control of the valve and opens and closes it?*

A. *The edger man.*

Q. *What happens when he operates that valve? What happens to these rolls?*

A. *When he lifts up on it that throws the—when he lifts up on it that throws them open.*

Q. *That lifts these rolls up?*

A. *Yes.*

Q. In other words they hinge up, possibly like that?

A. It is hinged right in here; this top is square above it—square across. Make it square across the top.

Q. And these hinges are down like that?

A. Something.

Q. And they are hinged so these rolls can be raised up?

A. Hinged right in here; don't come clear to the top.

Q. Don't come clear to the top?

A. No, don't open to the top.

Q. Something more like that?

A. They are hinged right in here.

Q. Now when he operates this steam valve how high can these rolls be lifted up above the live rolls below them?

A. They raise about twelve inches.

Q. Now this first roll that the lumber first strikes is a driver roll or corrugated roll, isn't it? A. Yes.

Q. And when the lumber comes out of the machine, what kind of a roll is that?

A. They are driven rolls.

Q. Is it any different from the one on the other side?

A. Yes, it is different; it is a solid table there.

Q. No, this first roll comes here.

A. That is from the edger.

Q. This edger roll, what kind of a roll is that?

A. That is corrugated also.

Q. Is that the same as the roll on the other side?

A. The same.

Q. Is it driven? A. Yes.

Q. As the board runs through there in which direction do these two rolls move? Which way do they roll?

A. They are moving forwards, towards you.

Q. So as to drive the board through the machine? A. Yes.

Q. When the board that we have referred to a while ago that came in on the conveyor rolls along here is shunted over on to these dead rolls, what does the edger man do to it to cut it into pieces; what happens next?

A. He has the saws set. As soon as he sees the timber coming, he has his saws set, knows what to cut them; he sets his saws so far apart, just as far as according to the figures he is cutting.

Q. After he gets his saws set and the lumber is lined up and laying there, what does he do to it?

A. Why, he steps on his pedal and sends it into the edger.

Q. That lifts these live rolls on the foot lever here and moves it up to this next live roll?

A. He lifts up his rolls; the edger steps on it until it catches hold the end of it and it goes on in.

Q. He operates this steam valve and raises this roll up and with these rolls, runs it in between them?

A. Yes.

Q. Then what does he do when it gets in there, the end of it?

A. He doesn't have anything to do then.

Q. So far you have just lifted this roll high up in the air.

A. They both raise at the same time, these here.

Q. *Does he lower this roll on the board?*

A. *It lowers itself. He just raises up and it goes down.*

Q. *Then this rests on the board?*

A. *Yes.*

Q. *And binds it down against this live roll?* A. *Yes.*

Q. Where does the board go then?

A. The board is supposed to go on through; generally does.

Q. And what happens to it? Comes on through out here?

A. Sawed in different dimensions.

Q. According to the set of the saws?

A. Yes.

Q. Where was your station?

A. My station was way back in the end here between—there was one roll out and space enough for me to stand in there.

Q. How far were you from the edger?

A. I was about thirty feet from the edger.

Q. What was your task back there where you stood?

A. Push the edgings off where the edger tailer—

Q. In other words, you were to get the lumber away from there? A. Yes.

Q. After it was cut. Of these three men, the liner-up down here, the edger man and you down here—the tailer edger man, who was superior; who was in charge of the machine there?

Mr. KING: I object. That has nothing to do with the allegations of this case.

COURT: I think it is proper to show the circumstances; no claim I believe.

Mr. KING: If it is just explanatory. You don't claim anything else for it, do you?

Mr. MOULTON: Well, I have a position in this case which I have already urged but which is not here; for the present I reserve my right to apply it to whatever it may be applicable, but I still think it is important as part of the situation here.

Mr. KING: For the purpose of the record, I would like to make an objection to that question on the ground that it is immaterial and irrelevant and not pertinent to any issue in this case, and may I save an exception to your Honor's ruling.

COURT: Very well. I think it is competent to describe the situation there.

Q. Will you just answer that; who was the man in charge out there?

Mr. KING: Same objection.

A. The man in charge of the machine is the superior officer.

Q. What is his title? A. Edger man.

Q. Who directs and controls the machinery up on one side, and the tailer edger on the other?

A. He is supposed to direct both men, the liner-up man and the tailer.

Mr. KING: It is understood my objection goes to all this.

COURT: Yes, I understand.

Q. Now you had been working there had you, right straight along for several weeks?

A. Several weeks.

Q. In that period of time, Mr. Nye, that you had been working there at this machine and before Simpson was hurt, how had this machine been working in respect to the readiness with which these rolls responded to the valves—raised up and came down?

Mr. KING: Object to the form of the question as leading, and also object as not competent evidence for any issue in this case.

COURT: I understand the charge of negligence here is that the apparatus was out of order, the valves were out of order.

Mr. KING: Object to the form of the question.

Q. Will you just answer, Mr. Nye, in regard to that?

A. It was out of order.

COURT: State how it operated.

Mr. KING: Move to strike out his conclusion.

COURT: Not your opinion of it.

Q. Tell how it responded and what it did.

A. When he was handling that lever, why it didn't press down on the timber hard enough; it didn't give the right pressure on the timber we were sawing.

Q. Would the boards come through without stopping—come right straight through?

A. Not always; sometimes they did, and sometimes they didn't.

Q. How often did they buckle and stop?

A. Pretty often at that time.

Q. Now do you know just how near he could close the two together at that time?

A. Couldn't come closer than two inches, that is without pressure.

Q. Couldn't come without pressure closer than two inches?

A. No.

Q. What about the manner in which the rolls close on a thin board, boards an inch thick?

A. Didn't have much pressure on an inch thick.

Q. How did it work in sawing boards an inch thick? What experience did you have with it here in regard to whether it would take hold of them firmly and drive them through?

A. The board stopped and we had to raise it up and whack down on it with the rolls.

Q. How often did it stop and stick that way?

A. Three or four times in half a day.

Q. How long did that continue, these rolls bucking that way?

A. Oh, well, it continued for a couple of weeks.

Q. Was that condition still existing when Simpson was hurt?

A. It was.

Q. Do you know whether a report has been made to the mill foreman? Do you know?

A. No, I don't. I don't know that.

Q. Now, then, will you tell the jury what you were doing and just what happened when Simpson was hurt?

A. They were sawing an inch board, an inch cant they call them; call them all cants; and they lined it up straight and it went through there all but one board, and it didn't.

COURT: What?

A. It went through, all but one board. They sawed it in three pieces, and they all went through but one.

Q. Let's get at it, Mr. Nye. How does it come that one board was longer than another in that situation?

A. It wasn't longer, but one board stopped and the other two went on.

Q. There were three pieces sawed. One board was sawed into three pieces, and two of them came on through?

A. Yes, and the other one stayed.

Q. The other one stopped? A. Yes.

Q. Where did it get before it stopped?

A. It got to the first roll on the edger and stopped.

Q. Did it get clear past the saw?

A. Between the saws.

Q. It was in between the saws?

A. Stopped in between the saws.

Q. *What happened then when it stopped?*

A. *The rolls were raised and they looked to see what was in there.*

Q. *Who did that?*

A. *The operator, the edger man.*

Q. *Where were you standing?*

A. *I was standing in my position back there between the rolls.*

Q. *What were you looking at?*

A. *Looking right at the edger.*

Q. *What was the reason you would be looking right at the edger?*

A. *I was watching—I had to be watching the edger all the time.*

Q. *What happened when these rolls were raised?*

A. *The board went out of there.*

Q. *Just describe the force and violence with which it went out, and which way it went out.*

A. *Went straight backward, as near as I could tell. Went straight back from the edger.*

Q. How much of that board yet remained between the saws when it went out?

A. None of it.

Q. I mean before it went out, when it stopped?

A. How much of it?

Q. Yes. A. The whole board was there.

Q. I just want you to say how far forward it had gotten before it reversed and went back?

A. Just between the saws.

Q. In between the saws there? A. Yes.

Q. Where did it come from there; assume this was the board?

A. Revolved in this way. This is supposed to be the edger and line-up here. The saws revolve backwards, you know, sawing lumber.

Q. This saw is driving against the board as it comes through there?

A. Yes, and the rolls push it that way.

Q. The roll is revolving in one direction, and the saw in another? A. Yes.

Q. *Where did the board go from the time it stopped there?*

A. *When he raised the rolls in about a second, it moved over like that. When it moved one side, it went out the other.*

Q. Which way did it go?

A. Straight back. I saw Simpson jump up in the air.

Q. Was any call or warning given?

A. There wasn't.

Q. *Was there any time for any warning to be given after it stopped?*

A. *Not after he raised the rolls. Wasn't no time to give a warning.*

Q. *How long was it stopped when the operator raised the rolls?*

A. *Didn't stop I couldn't say more than a second.*

Q. *How long after he raised the rolls before the board went back?*

A. *They went just about a second.*

Q. With what speed or force did it go?

A. It went with all the force anything could give.

Q. Can you give the jury any idea whether it just rolled back?

A. No, it went out of there like a bullet out of a rifle.

Q. Could you see it?

A. No, I couldn't see it. I see the man jump in the air, and I didn't know whether he was hit or not until I walked up that way, and everybody stopped generally.

Q. Where did the board go? Where was the board and Simpson when you got there?

A. I didn't go clear back to him. They all jumped in there and picked him up, and they were carrying him out so I never saw where the board went to.

Q. You didn't see where the board did lay back there?

A. No, I didn't.

Q. Could you tell from where you stood whether the board hit Simpson?

A. I could.

Q. And it hit him?

A. I know it hit him because it knocked him out; went right in his direction.

Q. Did you go back there to see whether anything there to indicate he had been hit?

A. No, I didn't. I could see all I wanted to see from where I was at. I saw he was hurt and it made me sick and I didn't go back there.

Q. You didn't go back there to him because others were there?

A. Yes.

Q. *Now, in regard to that steam cylinder that operates that, do you know what was the reason these valves wouldn't close those rolls down?*

A. *They wasn't adjusted right. That is all I know about it.*

CROSS EXAMINATION.

Questions by Mr. KING:

I want to get some of these matters clear here. I don't want to put you in the light of being misunderstood before the jury. About the last answer that you gave, you say the valves weren't adjusted right. That is just your own notion, isn't it?

A. *That is what everybody said. I saw them working on them afterwards.*

Q. *What I want to get at: You are just like any of the rest of us, you were told about the condition of the valves, and that is the basis on which you draw your conclusions that they were not adjusted right. Is that true?*

A. *Yes, sir.*

Mr. KING: *If your Honor please, at this time I move to strike out the testimony of the witness with respect to the condition of the valves from the record.*

COURT: *It will be eliminated.* (Bill of Exceptions, p. 12-21. Transcript, p. —.)

* * * *

Q. Now there is one point I didn't get clear. I tried to pay attention. How long did you say this piece of lumber was that was coming through the edger?

A. I don't believe I said.

Q. Maybe you didn't. I thought you didn't say. I thought I might not have paid attention.

A. No. I was to tell the length of the table. Nobody asked that question.

Q. How long would you say that was?

A. About thirty foot; it wasn't long enough for me to get hold of it; it couldn't have been that long.

Q. You couldn't reach it?

A. No, I couldn't reach it.

Q. You were standing thirty feet back from that edger?

A. Yes, back here, and pretty hard to get out, about three foot deep.

Q. Mr. Nye, you spoke of the edger on one side being up three feet, or thirty-six inches, this big side edger. Now there are two little projections over here?

A. Yes.

Q. Do you want the jury to understand that they run all parts of the edger at the same time, or do they run different parts at different times?

A. All these saws run on one shaft.

Q. I know turning. Suppose this piece coming through here now. Would they also put another piece over here and have it go through?

A. At the same time, yes.

Q. Have it go through at the same time?

A. Yes.

Q. They were not doing that at the time Mr. Simpson was injured. Was just this one big slab going through?

A. Just this one inch board.

Q. Just this big side edger was running at the time he was hurt?

A. Just this one side. (Bill of Exceptions, pp. 27-29; Transcript, p. —.)

* * * *

Q. Now, Mr. Nye, as I understand, this cant that was being sawed at the time of the injury to Mr. Simpson, was one inch?

A. Was one inch.

Q. Thick. About thirty inches wide and thirty feet long. Is that right?

A. That is right.

Q. And was being sawed into three separate pieces at one operation as it came through this edger, came through the edger and went on through, being sawed into three pieces; here is where it comes on the rolls up here. You say you saw Mr. Simpson line that up, did you?

A. Yes, sir.

Q. You were watching him at the time; is that right?

A. I watched him, yes.

Q. And he lined it up by raising up these rolls, did he? The sunken rolls here, the live ones?

A. No, he had nothing to do with these rolls, these chains here that held them up and held the lumber down.

Q. After the lumber was lined up, you say Pete raised up the live rolls to bring it to the edger here. Did you see him do that?

A. I couldn't see him step on the pedals there; they were at the side, but he shifted the edger; it went in the edger all right.

Q. Were you watching him? A. Yes.

Q. How much could you see of Pete at that time?

A. I could see more than his head and shoulders.

Q. How much more could you see?

A. Four or five inches more.

Q. Around up here? A. Yes.

Q. *You could see both hands, could you?*

A. *I could see his hand as he handled the lever.*

Q. How high would he put his hand up? Just show about what position?

A. Just like this.

Q. Just like this?

A. Don't take much strength to do it.

Q. It doesn't?

A. No, a finger will do it.

Q. *And he lifted it up?*

A. *Yes, just put the steam in.*

Q. *And when he lets go of it, the rolls come right down. Is that right?* A. *Yes.*

Q. *The rolls come down slowly, do they, or how do they come?*

A. *They come down fast. You give it release, you know.*

Q. Have you had enough experience there that you could judge the weight of these dead rolls, how many hundred pounds it would weigh, the roll on each side?

A. I don't think would weigh more than 200 pounds.

Q. Apiece? A. Apiece.

Q. That is your best judgment of them?

A. That is my best judgment.

Q. Now of course you never made any study of edgers?

A. No.

Q. They might weigh five hundred pounds, as far as you know?

A. I am sure they wouldn't weigh that.

Q. Aren't they solid?

A. No, I don't think they are.

Q. Anyway pretty heavy; you are sure they won't weigh that much?

A. Yes, sir.

Q. You have never seen one of these valves apart?

A. No, sir.

Q. Never saw the inside of it? A. No.

Q. *When the lumber went in—the lumber is lined up, that piece Simpson put on there to be sawed; Pete Matesco brought up these rolls and brought it up to the edger, and then lifted up this dead roll and started off with the saw?* A. *Yes, sir.*

Q. *Then the dead roll was dropped on top of it, is that right?*

A. *That is right.*

Q. Then it started through and kept on going through and of course when it came out this other side that dead roll would be on top of it too, wouldn't it?

A. It would if pressed down hard enough.

Q. And came out on the other side and came clear out here; you say two of the three pieces stayed on the other side?

A. They did.

Q. Then the third piece that they were cutting it into stopped, did it?

A. Just far enough so I couldn't get hold of it. I might have pulled it.

Q. You couldn't reach it? A. No.

Q. *You say it stopped?* A. *Yes.*

Q. *Did you yell at anybody when it stopped?* A. *No.*

Q. *Did it come to a distinct stop?*

A. *It did.*

Q. *Still, was it, for a second?* A. *Yes.*

Q. *Then you say Pete, who was standing here on this side, lifted up the dead roll and looked under there to see what was the matter?*

A. *He did.*

Q. *Did the dead rolls both lift up in the air?* A. *They did.*

Q. *After they both lifted up in the air and were up above here away from the piece, this third piece shot right back through here and went out, and went on over and struck Mr. Simpson?*

A. *It did.*

Q. *You saw it hit him?* A. *I did.*

Q. *Now when Pete Patesco lifted up the dead roll on the side where you were, how many inches did he lift it up?*

A. *Lifted clear to the top.*

Q. *Lifted the full twelve inch space you said?*

A. *Yes, sir.*

Q. *Did both of the dead rolls raise up and lower at the same time? The same lever makes them both raise up and both fall?*

A. *They do.*

Q. *It takes steam. It takes the letting in of steam to raise them up?* A. *Yes.*

Q. *When you let go the lever they drop; the steam comes out?* A. *Yes.*

Q. Now while this piece was going through the edger, the one that was in the edger at the time of the accident to Mr. Simpson, you didn't have anything to do at that time, did you?

A. When it was going through the edger?

Q. Yes. You wouldn't have any duties then, would you? A. No.

Q. It is only after the piece has arrived on the other side that you have to do anything taking it away, is that right?

A. As soon as it comes down to me. I wasn't supposed to go to the tables.

Q. I do not intend to criticize you at all. I was just asking for information. I wanted to know. I want to know about operating the edger. I want to know while the edger is at work, the piece coming through, do you have anything to do at that particular time?

A. I do, sometimes.

Q. But on this particular occasion you didn't, is that right?

A. I didn't, no.

Q. Do you remember what piece was sawed just ahead of this one? A. No.

Q. Whatever that was, you had put that away, had you? A. Yes.

Q. And now the table on which these pieces lay after they came through the edger, that is on the same level as the rolls which feed the edger is on, same distance from the floor, isn't it?

A. Same distance—yes, the rolls that raise up, they are about the same level.

Q. Yes, that is what I mean. He raises up these live rolls and that carries to the edger and it goes through the edger and comes to the table on the rolls there; they come on the same level as the live rolls which raise up? A. Yes.

Q. By "he" I refer to the edger, Pete Matesco? A. Yes. (Bill of Exceptions, pp. 36-41; Transcript, p. —.)

* * * *

Q. Suppose no lumber in there at all, in the edger machine; do you want the jury to understand that this dead roll would be up in the air and not touching the live roll?

A. Yes, it would be up—it was that way so it would be up some space; bound to be a little.

Q. *Why bound to be a little?*

A. *Because they couldn't saw anything less than one inch, wouldn't come clear together—half inch apart—it ought to be that way.*

Q. What would hold it up in the air, what force would hold it up in the air if there was no steam on and no timber in there?

A. There wouldn't be no holding up in the air if didn't have no steam.

Q. That is what I said; it would rest right down on the live roll down below, wouldn't it?

A. Rest down.

Q. Come clear down and touch the live roll, wouldn't it?

A. It would.

JUROR: You don't mean that, do you?

COURT: What did you mean a short time ago when you said the dead roll would not come within two inches of the live roll?

A. It wouldn't when the steam was on, when they were working it there.

COURT: When the steam was on?

A. Yes.

COURT: What was the steam on for, to raise it or lower it?

A. The steam was there to raise or lower it.

COURT: The steam was used all the time?

A. Used all the time. I never saw it when wasn't steam there.

COURT: I thought the way you testified that they left the steam in to raise the roll, raise it up, then shut the steam off and the rolls came down of their own weight.

A. A double valve, works up and down both.

Q. Always steam there?

A. Always steam there.

Q. Mr. Nye, that raises another question. I thought you said you had never seen the inside of one of these valves.

A. That has been explained to me.

Q. I mean, you don't know of your own knowledge what it does, do you?

A. No.

Q. That is right?

A. That is right. I don't know, but been explained to me that way.

Q. Let me repeat my question. Supposing there is no timber coming through the edger so that the timber itself would not separate the rolls; there is no timber there; suppose the edgerman has let this throttle down; he is not holding it up; wouldn't that dead roll touch the live roll in front of the edger?

A. I have never seen it when it touched clear down.

Q. You have never seen it when it touched clear down? A. No.

Q. Did you ever look at it then?

A. I have.

COURT: How close would it come to the live roll?

A. Well it would be an inch and a half or two inches, as near as I can remember.

Q. Now Mr. Nye, if it were an inch and a half or two inches it would not touch a one inch piece of lumber at all, would it? Is that right?

A. Probably it would, chousing it up and down; they used to chouse it up and down, and bound to go through there you know.

Q. I will ask you, did it touch piece of timber that was going through, the piece of lumber that was going through at the time Mr. Simpson was hurt?

A. He had to give a couple of jerks, give it a jerk on this; do that, and it would pound down on it; pound it through, you know.

Q. You saw Pete Matesco you say give this lever a couple of jerks? A. Yes.

Q. You don't know why de did it?

A. Why, did it on all them that didn't go.

Q. After he got done giving it the couple of jerks, it then rested on the piece of lumber.

A. Not very solid, no.

Q. Not very hard? A. No.

Q. Could you tell by looking at it thirty feet away how hard it rested on the lumber?

A. *I could tell if it had been any space between, it wouldn't have went.*

Q. *What?*

A. *If been any space it wouldn't have went, the lumber wouldn't have went through.*

COURT: *What do you mean by space?*

A. *Space between the roller and the lumber.*

COURT: *You mean the lumber would not pass on through unless held down by the upper roller?*

A. *No, it wouldn't; that is right.*

COURT: *If the upper roller was up two inches and it was a one inch board they were sawing, it would not have gone through? Is that what I understand?*

A. *Yes.*

Q. Now of course you couldn't see the dead roll on the other side of the edger from you?

A. No, I couldn't see that roll.

Q. *But at the time that the piece was coming out on your side of the edger, on the bearing off side of the edger, the dead roll was then resting on the piece of lumber, wasn't it?*

A. *It was, as near as I could see.*

Q. Now you say it was resting some; could you tell how hard it was resting?

A. No, only judging by the timber not all coming through.

Q. In other words, it is your conclusion from the fact that one third of this slab of lumber didn't come through; it is your conclusion that the rolls didn't rest hard enough on the piece of lumber. Is that right?

A. That is the way I figure.

Q. Well now, Mr. Nye, it rested hard enough on that lumber to cause it to come all the way through but a short part of the distance, didn't it? A. Yes, it did.

COURT: Do you understand that question? Did this piece of lumber that struck Mr. Simpson come through the second roller at all?

A. No, it didn't come through the second roller.

COURT: I thought that is what you testified; but in your answer to counsel's question you implied that it did. He said two pieces went through, but the third one didn't.

Mr. KING: He meant didn't come clear through.

A. You asked me if it went past the first roller.

Q. Let's go through it again, I want it straight. Now the edgerman, Pete Matesco, raised up these live rolls? A. Yes.

Q. And it had this piece of lumber on it? A. Yes.

Q. And you brought the piece of lumber up to this first live roll and the first dead roll, did you? A. I did.

Q. Pete Matesco raised up the dead roll, did he? A. He did.

Q. Sure he raised it up?

A. I don't know whether he raised it or not, it went in there.

Q. You didn't see him raise it then. What is your recollection of that, did he raise it? I understood you to say a while ago he did raise it.

A. I said he did raise it, is what I said.

Q. Is that true? Did he raise it?

A. He did, as far as I can remember.

Q. Now it came into the saw, didn't it?

A. It came into the saw.

COURT: And he let the roller down again, did he?

A. He let the roller down; always raises it for every piece of timber.

COURT: And then lets it down again on the timber? A. Yes.

Q. So that timber started to go into the saw then, didn't it? A. Yes.

Q. That was being cut by two saws so it would make three pieces? A. Yes.

Q. And the pieces began to come out over this live roll on the other side and between the live roll and the dead roll on the other side of the edger, this side you were on, is that right? A. Yes.

Q. All three of them went through, started? A. All but one.

COURT: He said two went through, the other didn't.

A. Two went through.

Q. You mean two pieces stuck their nose out here, but one didn't?

A. All went through until got past this —all went through until got past this roll here.

Q. Let's take the end of the timber; let's take the back end of the timber that is going into the saw; where was the back end of the timber when it started in there over that last—where was it when the timber stopped and began to come back, the tail end of it?

A. The tail end of it, right there, between the saws.

Q. The tail end was in the saws?

A. Yes, and two went in, the two pieces, and this other one stayed there.

Q. *And kicked back?*

A. *And kicked back when he raised up the rolls.*

Q. *When he raised up the rolls?* A. *Yes.*

COURT: But the third piece, the one that struck Simpson, didn't go over the second roll? A. No, it didn't.

Q. Let's get that clear.

COURT: That is what he said.

JUROR: He has explained that five or six times. Two pieces went through and one stopped there and kicked back.

Q. I want to know where the back end was when that struck there?

A. Right in there.

Mr. KING: Judge Bean, this back end never reached the saws.

COURT: The one going towards the saws or away from the saws?

Mr. KING: I call it the tail end, the last piece. The one that kicked back was in that position. Is that right? A. Yes.

COURT: It had gone through the roller?

A. That is the way I understood the question.

COURT: You have been testifying, as I understand you, that the third piece never went through the second roll at all, never went into the second roll.

JUROR: All went through.

A. Let me explain that. The timber went through—all of it went through there, past this first roller, the two pieces went on and the other piece stayed between these two.

COURT: The rear end of it.

A. The rear end of it, yes.

COURT: And kicked back this way?

A. Yes.

JUROR: *The facts of the case are that the saw had to cut the full three pieces before the two could go on and one stay there; it certainly was cut, you say?* A. *Yes.*

Mr. KING: *It was cut at the time it stopped?* A. *It was.*

Q. *Clear cut?* A. *Yes.*

Q. *Now let's get that straight. The slab had been clear cut at the time this one piece stopped. It was all cut into three pieces, is that right?* A. *Yes, that is right.*

Q. *In some way or other the roll was raised and two pieces went out at your end of the edger, the other piece, after Matesco raised the roll, that went clear back in through there?*

A. *Came clear back through.*

Q. *Through this other roller, and went clear back out through the end. Is that right?* A. *That is right.*

COURT: I understand now. I couldn't see how the saw could throw it back if it had passed there.

Mr. KING: I had some difficulty.

Q. Take this stick and assume that it is the width of that piece thirty feet long and thirty inches wide, and show where the piece

was at the time the two pieces fell off and the other piece stopped; just shoved through; the machine was there, and shoved through.

A. Run just to the end of the saw.

Q. Started in here, in under these rolls here, and began to come through coming in between these two, came on through, came on through and got clear through the saw?

A. No, no. Not through the saw; to the edge of the saw.

Q. And then two pieces of it went on through these other rolls?

A. And that one stayed there.

Q. *And after it stopped Pete Matesco raised this roll?*

A. *And the roll opened.*

Q. *And the third piece kind of swung to one side and kicked back clear through there. Is that right?* A. *That is right.*

Q. I guess I don't get that. How far is it, Mr. Nye, between the dead roll on one side of the edger, right through the saws, you know, measuring right through the saws—how far is it to the dead roller on your side of the edger?

A. About three feet through there.

Q. About three feet. Three feet you say from here to there? A. Yes.

Q. Three feet from this roll to this roll?

A. Yes.

Q. And you say the saw in there was thirty inches? A. Yes.

Q. In diameter. Now, Mr. Nye, directing your attention to this drawing, I will explain it. This represents the edger looking down on top of it, on the dead roll; that would be the dead roll on your side.

A. Yes.

Q. This would be the dead roll on the side where Simpson was working? A. Yes.

Q. And here would be the dead rolls and mingled with the live rolls, you see, in front. Now here is the chain that brings the pieces of lumber over from the conveyor, that runs along there, and here are the chains that are running it off in this direction to move the lumber back over against the pointers to line it up.

A. That is right.

Q.In other words, these chains are running that direction and these over here are always moving that direction, so if Mr.

Simpson or the operator brings the piece of lumber off the conveyor and brings it over here and over right up to the right hand side of the edger, he can still have this other chain and move back over against the pointers along there, can't he?

A. That is right.

Q. You say this piece of lumber went back so fast you couldn't see it?

A. Just saw a streak of it, couldn't see the shape of it, whether went in two pieces or three pieces. I say you could just see a streak of it.

Q. *You could see it coming out of your side of the edger? Couldn't you?* A. *Yes.*

Q. *You saw it stop?*

A. *Sure I saw it stop.*

Q. Anything else ever cause a piece of lumber coming through the edger to stop?

A. Yes, I have seen large timbers stop.

Q. Not only one inch pieces stopped, were they?

A. No, not only one inch.

Q. Large pieces stop also?

A. Yes, they were stuck, they killed the power.

Q. Sometimes they killed the power?

A. That is the only reason then.

Q. Don't larger pieces kick back sometimes when the saw strikes a twist or knot, or a splinter comes in alongside the saw and causes it to heat and bind?

A. I never seen one kick back on account of being bound though, with any force.

Q. Did you ever see any saw kick back because a splinter got down inside the edger and caused it to heat?

A. Have seen it get hot, couldn't go through.

Q. You never saw a piece kicked back that way?

A. That is right, I never did.

Q. In other words, when you worked for the McCormick people, did any pieces kick back?

A. Well I didn't see them, but I heard about a couple.

Q. And the rolls there didn't touch either, did they?

A. They were large timbers kicked back through, both large pieces.

Q. Did the rolls touch those large timbers? A. They did.

Q. What?

A. They did, but that was on account of a knot, or something.

Q. You say a knot in the piece that kicked back at the McCormick mill?

A. I didn't see it, he told me. He told me knots caused them to kick back because it would raise the roll and that would give the space.

Q. I didn't hear.

A. I say would raise the rolls in going in, and that gives a space, and they kick back.

Q. The knot would raise the rolls?

A. Sure.

Q. *Didn't that piece kick back before Pete Matesco raised the rolls?*

A. *It did not.*

Q. *What?* A. *It did not.*

Q. *You are sure of that?*

A. *I am sure of that.*

Q. This edger was the same general type of edger that was used in the McCormick mill? A. No, different.

Q. What difference?

A. It was a little heavier.

Q. A little bigger edger? A. Yes.

Q. And heavier safeguards on it too, didn't it have?

A. It did, yes.

Q. It was heavier construction throughout? A. It was.

Q. Had much heavier roll on the top of the saw—dead rolls? A. Yes, sir.

Q. Eight inch dead rolls are pretty large dead rolls? A. Yes, sir.

Q. Just one other question that occurred to me. Can you speak the name of any edger that never kicked back? A. No.

Q. What? A. No, I cannot.

(Bill of Exceptions, pp. 43-55; Transcript, p. —.)

* * * *

Q. Now, when this piece came back and struck Mr. Simpson, he was standing here where you marked "S" was he not?

A. As near as I could tell he was not.

Q. How did that piece come back? Just where did it come?

A. Comes straight back.

Q. Straight back?

A. As near as I could tell.

(Bill of Exceptions, p. 56; Transcript, p. —.)

The witness Nye states clearly in his testimony that the 30-inch board (commonly referred to by witnesses as a cant), which was being sawed at the time of the accident, was completely cut by the saws contained in the edger when it stopped. The witness was positive that it came to a distinct stop. (Brief, p. 54.) The witness further states that after the board came to a distinct stop Pete Matesco, the edgerman, raised the dead rolls and that thereupon one piece of the board, which was being cut into three pieces, shot backwards, striking Simpson and inflicting the injuries for which recovery is sought. The statement of the witness Nye that the edgerman raised the dead rolls prior to the time the lumber shot backwards are confirmed by those of the witness George, who came to the aid of Simpson. This witness states that he picked Simpson up and looked backwards at the edger. As to the position of its rolls, the witness George gave the following testimony:

Q. "And did you then as you sat there holding him, did you turn and look back at the rolls at all? A. Yes.

Q. What condition were they in, as you looked back?

A. The rolls were up.

Q. How far up?

A. I guess about six inches."

(Bill of Exceptions, p. 98; Transcript, p. —.)

* * * *

Q. "When you say the rolls were up six inches, which ones do you mean?

A. I meant the dead rolls on the edger."

(Bill of Exceptions, p. 101; Transcript, p. —.)

The negligence alleged in the amended complaint is that the valves of the edger were defective so that they would not permit the steam to escape from the cylinders promptly and let the dead rolls drop upon the lumber being cut.

The uncontradicted evidence of the witness Nye, corroborated by the testimony of the witness George, both of which witnesses were produced by the plaintiff, was that the edgerman lifted the rolls and that thereupon the lumber shot backwards. If the dead rolls were lifted by

the edgerman, it is apparent that the failure of the valves to promptly release the steam and thereby permit the rolls to fall was not a cause which contributed to the accident.

If the valves had been in proper condition the act of the edgerman in raising the dead rolls would have released the lumber from the pressure of the dead rolls and the accident would have resulted. The testimony of the witness Nye which is uncontradicted by any other testimony in the record establishes a basis for the sole inference that the negligence of the edgerman was the direct and proximate cause of the accident.

Charges were made in paragraph VI of the amended complaint that the dead rolls were kept partially or completely lifted, and were prevented from descending on the lumber with sufficient force to hold the same firmly in position and cause the same to be driven against the saws in a straight course. The only testimony upon this point is that of the witness Nye who testified that after the dead rolls had been raised by the edgerman the lumber swerved to one side and was then kicked backward by the saws. (See Brief, p. —.)

There is no evidence in the record that the piece of lumber being sawed had deviated from a straight course while being cut.

Plaintiffs Cannot Recover for Negligence of Edgerman in Raising Dead Rolls.

No negligence on the part of the edgerman in lifting the rolls was alleged in the amended complaint. For this reason the plaintiffs cannot recover by reason of such a negligent act, even though established by the evidence. Plaintiffs can recover only upon the negligence charged in their amended complaint.

(See cases cited under Points I and Ia under Brief of Argument.)

An allegation was embodied in the original complaint to the effect that the edgerman negligently raised the dead rolls. A motion was filed by the plaintiff in error to strike such allegation from the complaint for the reason "the same consists of common law negligence for which no right of action exists in favor of the surviving widow and children". This motion was sustained by the court below.

The negligence of the edgerman is not a violation of the duties imposed in the Employers' Liability Law, Section 6785, Oregon Laws, quoted post page 71. It is a common law negligence for which a right of action vests in the personal representative of the deceased under the provisions of Section 380, Oregon Laws, which is as follows:

"When the death of a person is caused by the wrongful act or omission of another,

the personal representatives of the former may maintain an action at law therefor against the latter, if the former might have maintained an action had he lived, against the latter, for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and damages therein shall not exceed $7500, and the amount recovered, if any, shall be administered as other personal property of the deceased person."

Graham v. Bowman-Hicks Lumber Co., quoted post, page 76.

Jury Cannot Speculate as to the Cause of Injury.

As we have pointed out in the earlier portion of this brief, the positive evidence of the only eye witness of the accident produced by the plaintiffs, whose testimony in this particular is not contradicted elsewhere in the record, is to the effect that the board was kicked back by reason of the negligence of the edgerman in raising the dead rolls. It is our contention that the record establishes that the negligence of the edgerman in raising the rolls was the proximate cause of the injury. We have further shown that the plaintiffs cannot recover for such negligence in the present action.

If it be assumed that the evidence does not positively establish that the act of raising the rolls was the cause of the accident, it does estab-

lish that it was a possible cause of the accident. That the act of the edgerman was a possible cause of the accident is shown by the testimony of John P. H. Reicka, an expert witness who was called by the plaintiff and who testified on cross-examination as follows:

> Q. "Suppose the edgerman held up—lifted up the dead roll when the stick was stuck, would that have the same effect?
>
> A. That would immediately throw the stick out."
>
> (Bill of Exceptions, p. 115; Transcript, p. —.)

The record is replete with testimony that the heating of the saws would cause the lumber to kick back.

The jury would then be required to speculate as to whether the cause of the accident was the improper condition of the valves in preventing the dead rolls from resting upon the lumber, the act of the edgerman or the heating of the saws. For the last two causes the plaintiff cannot be held responsible in the present case for such negligence is not alleged in the amended complaint. The evidence must point directly to the conclusion that the injury was caused by one of the acts of negligence charged in the amended complaint. A jury cannot speculate as to which of several possible causes was the actual cause of the injury.

Where the evidence is such that the jury is left to speculation as to the cause of the damage or injury complained of, the plaintiffs cannot recover.

Holmberg v. Jacobs (1915), 77 Or. 246, 253:

> "Such a state of the testimony leaves the jury merely to speculate upon the actual cause of the accident, and the authorities are unanimous to the effect that a recovery cannot be made to depend upon pure speculation. The plaintiff, having assumed the burden of proof, must make her case as laid in her complaint. There is a gap both in her pleadings and her testimony between the alleged negligence and the injury of which she complains."

Spain v. Oregon-Washington Railroad & Navigation Co. (1915), 78 Or. 355, 369:

Plaintiff brought this action to recover damages for being wrongfully arrested and expelled from the defendant's train and confined in a filthy jail. As an element of damages, the plaintiff alleged that he was suffering from a recently amputated arm and that by reason of his treatment and confinement in the jail, the wound was reinfected and a second amputation became necessary. The proof disclosed that the reinfection might have resulted from several causes other than the action of the defendant in eject-

ing the plaintiff from its train and causing his imprisonment. In holding that this element of damage should have been withheld from the consideration of the jury, the court stated on page 369:

> "Now, from this testimony, which is wholly from plaintiff's witnesses, there may be drawn several inferences: (1) that the inflammation which ensued upon the 21st was a mere phase of an infection already shown to exist in the wound; (2) that it arose from plaintiff's activities around the racetrack at Boise; (3) that it came from unsterilized dressings applied by Mrs. Simms before plaintiff's departure for Boise; or (4) that it arose from unsanitary condition existing in the jail at Huntington. There is no evidence which has a tendency to show from which of these causes the subsequent aggravated condition arose. It might have been from any one of them, or, if there exists any reason to differentiate, the first of the possible causes would seem the most probable, as there can be no question under plaintiff's own testimony but that some infection resulting in a discharge of pus existed at the time he left for Boise. That his arm was not in an entirely satisfactory condition while at and returning from Boise is shown by his complaint, which alleges that he was 'suffering from a recently amputated arm and was then on his way to consult his regular phy-

sician'. When the evidence leaves the case in such a situation that the jury will be required to speculate and guess which of several possible causes occasioned the injury, that part of the case should be withdrawn from their consideration: Armstrong v. Town of Cosmopolis, 32 Wash. 110 (72 Pac. 1038). So far as the wrongful arrest detention and imprisonment, and the filthy condition of the jail, are concerned, the plaintiff made a case sufficient to go to the jury; but the court should have withdrawn from their consideration the subject of the effects of these acts upon the condition of plaintiff's arm as constituting an element in plaintiff's recovery."

Medsker v. Portland Railway, Light & Power Co. (1916), 81 Or. 63, 69:

The evidence disclosed that plaintiff's intestate, a lineman, was killed as the result of a fall from a telephone pole, but did not establish whether plaintiff's intestate lost his balance, or was caused to fall by coming in contact with a charged guy wire of the defendant company. In sustaining a judgment of nonsuit, the court stated on page 69:

"This constitutes the entire testimony relating to the cause of the injury. The death was undoubtedly occasioned by the fall, but whether the descent resulted from coming in contact with the south guy wire, or was

caused by the deceased losing his balance, is problematical. In Spain v. Oregon-Washington R. & N. Co., 78 Or. 355 (153 Pac. 470, 475), Mr. Justice McBride, in discussing the uncertainty of such testimony observes: 'When the evidence leaves the case in such a situation that the jury will be required to speculate and guess which of several possible causes occasioned the injury, that part of the case should be withdrawn from their consideration.' "

Bridenstine v. Gerlinger Motor Car Co. (1917), 86 Or. 411, 426:

"It is strenuously insisted that there was enough competent evidence to carry the question of Hargroves' agency to the jury. Verdicts must be supported by evidence; and they cannot stand when founded only upon supposition, speculation and conjecture. As we read the record, the most that can be said for the verdict, if the incompetent evidence is first eliminated and if it is then assumed that the verdict rests upon a finding that Hargroves was an agent of the company, is that it was founded upon speculation and conjecture: Spain v. Oregon-Washington R. & N. Co., 78 Or. 355, 369 (153 Pac. 470); Parmelee v. Chicago M. & St. P. Ry. Co., 92 Wash. 185 (158 Pac. 977)."

Stevens v. Myers, (1919), 91 Or. 114, 117.

An Inference Cannot Be Founded Upon An Inference or a Presumption.

In determining whether the praintiffs produced sufficient evidence to support the charges of negligence to warrant the submission of their case to the jury, the jury is not permitted to found an inference upon an inference or base an inference upon a premumption. This rule is firmly established in the State of Oregon.

Deniff v. Chas. R. McCormick & Co., (1922), 105 Or. 697, 704.

State v. Hembree, 54 Or. 463.

Stamm v. Wood, 86 Or. 174.

State v. Rader, 94 Or. 432, 456.

If it be assumed that there is evidence in the record that the lumber being cut came to a stop and that the mere fact that the lumber stopped was the proximate cause of the accident (which we contend is not the case) the jury would be required to infer from such evidence that the lumber stopped by reason of the insufficiency of the pressure of the dead rolls upon the lumber, and not because the saws became hot. The jury would then be required to found a second inference upon the first, namely, that the rolls did not press down upon the lumber because of a defect in the valves. This second inference is required because there is no testimony in the record of any examination of the valves by any one which disclosed a defective condition at the time of the accident. Under the foregoing au-

thorities this second inference cannot be founded upon the first so as to hold the plaintiff in error liable in the present action.

It is our contention that there is no evidence in the record that the lumber being sawed moved out of a straight course towards the saws in the edger. If it be assumed that the record contains such evidence, the jury would have to infer therefrom that such deviation was caused by the fact that the dead rolls did not rest with their full weight upon the lumber. In order to hold the plaintiff in error liable, the jury would then be required to base a second inference upon the first, to-wit, that the dead rolls did not rest upon the lumber because of a defect in the valves. The verdict cannot be permitted to rest upon this second inference.

If it be contended that there is evidence in the record that the valves were out of order at some date prior to the accident and that there is a presumption that this condition continued to exist, still the jury would have to base an inference on this presumption, to-wit, that such defective condition of the valves prevented the dead rolls from resting fully upon the lumber. This as well as the foregoing instances would be a violation of the rule that a verdict cannot be supported by an inference based upon an inference, or an inference based upon a presumption. It follows that there was no competent evidence in the record to permit the submission of the case to the jury, even if assumptions of proof be made as hereinabove stated.

All of the foregoing assumptions do not take into consideration the gap between the fact that the lumber stopped, and the actual occurrence of the accident. It would be pure conjecture to permit the jury to find that accident would have occurred merely because the board stopped and if the edgerman had not raised the dead rolls. If inferences could be drawn as outlined above, still there was the intervening act of the edgerman in raising the rolls. There is no statement in the record by an expert witness or otherwise, that the lumber would have been kicked back if the dead rolls had not been raised. This, in our view, is a vital defect in plaintiffs' case, namely, the failure to prove that the alleged defect in the valves was the proximate cause of the injury.

Policy of the State of Oregon to Limit Recovery of Damages For Death.

It has long been the policy of the State of Oregon to limit the recovery of damages for death resulting from negligence. The language of Section 380, Oregon Laws, which was enacted in 1862, is as follows:

> "When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action at law therefor against the latter, if the former might have maintained an action had he lived, against the latter, for an injury done by the same act or omission. Such action shall be com-

> menced within two years after the death, and damages therein shall not exceed $7500 and the amount recovered, if any, shall be administered as other personal property of the deceased person."

This statute has stood unmodified upon the statute books of the State of Oregon since the time of its enactment, except that the amount of damages recoverable was increased in 1907 from $5000 to $7500. It is declaratory of the policy of the state with respect to the limitation of damages recoverable for death. The cause of action for such death is vested in the administrator of the deceased person.

In 1911 the Employers' Liability Law of Oregon was enacted. The pertinent provisions of this statute with respect to the present controversy are found in Sections 6785 and 6788, which are as follows:

Section 6785:

> "All owners, contractors, sub-contractors, corporations or persons whatsoever, engaged in the construction, repairing, alteration, removal or painting of any building, bridge, viaduct, or other structure, or in the erection or operation of any machinery, or in the manufacture, transmission and use of electricity, or in the manufacture or use of any dangerous appliance or substance, shall see that all metal, wood, rope, glass, rubber, gutta percha, or other mate-

rial whatsoever, shall be carefully selected and inspected and tested so as to detect any defects, and all scaffolding, staging, false work or other temporary structure shall be constructed to bear four times the maximum weight to be sustained by said structure, and such structure shall not at any time be overloaded or overcrowded; and all scaffolding, staging or other structure more than twenty feet from the ground or floor shall be secured from swaying and provided with a strong and efficient safety rail or other contrivance, so as to prevent any person from falling therefrom, and all dangerous machinery shall be securely covered and protected to the fullest extent that the proper operation of the machinery permits, and all shafts, wells, floor openings and similar places of danger shall be inclosed, and all machinery other than that operated by hand power shall, whenever necessary for the safety of persons employed in or about the same or for the safety of the general public, be provided with a system of communication by means of signals, so that at all times there may be prompt and efficient communication between the employees or other persons and the operator of the motive power, and in the transmission and use of electricity of a dangerous voltage full and complete insulation shall be provided at all points where the public or the employees of the owner, contractor or sub-contractor transmitting or using said electricity are

liable to come in contact with the wire, and dead wires shall not be mingled with live wires, nor strung upon the same support, and the arms or supports bearing live wires shall be especially designated by a color or other designation which is instantly apparent and live electrical wires carrying a dangerous voltage shall be strung at such distance from the poles or supports as to permit repairmen to freely engage in their work without danger of shock; and generally, all owners, contractors or sub-contractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employees or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device without regard to the additional cost of suitable material or safety appliance and devices."

Section 6788 as Amended by Laws of 1921, p. 38:

"If there shall be any loss of life by reason of the neglects or failures or violations of the provisions of this act by any owner, contractor, or sub-contractor or any person liable under the provisions of this act, the surviving widow or husband and children and adopted children of the person so killed and, if none, then his or her lineal heirs and,

> if none, then the mother or father, as the case may be, shall have a right of action without any limit as to the amount of damages which may be awarded; provided, that if none of the persons entitled to maintain such action reside within the State of Oregon, then the executor or administrator of such deceased person shall have the right to maintain such action for their respective benefits and in the order above named."

Under the provisions of Section 6788, Oregon Laws, quoted hereinabove, the cause of action for damages resulting from a violation of the duties imposed upon employers by Section 6785, Oregon Laws, quoted hereinabove, is vested in the surviving widow and children. The amount of damages is unlimited. It is our contention that by reason of the policy of the State of Oregon to limit the damages recoverable for death, the plaintiffs must clearly bring themselves within the provisions of the Employers' Liability Law. In other words, the cause of action does not vest in the plaintiffs unless the plaintiff in error was guilty of some violation of the Employers' Liability Law which has been alleged in the amended complaint. In our review of the evidence hereinbefore, it appears that there is evidence in the record that the edgerman was negligent in raising the dead rolls. This, however, was common law negligence for which a cause of action vested in the administrator of Clyde C. Simpson under the provisions

of Section 380, Oregon Laws, quoted *supra,* page 70. The time in which such cause of action may be commenced will not expire under the provisions of said section until two years from the date of the death of Clyde C. Simpson, which, according to the allegations of the amended complaint, occurred on October 29, 1924.

The plaintiffs were definitely advised of our contention in this respect by a motion directed to the original complaint in the present action. The original complaint contained a charge of negligence in addition to those specified in paragraph VI of the amended complaint (see page 4 of this brief), which was set out in paragraph IX thereof in the following language:

> "And thereupon the operator of said gang edger who was an employe of the defendant carelessly and negligently repeatedly lifted the said dead rolls and dropped the same and released the pressure upon said lumber and permitted the same to be loose upon said power driven lower rolls."

A motion was filed by the plaintiff in error to strike out the above allegation upon the ground "that the same consists of common law negligence for which no right of action exists in favor of the surviving widow and children." This motion was granted by the court below, Judge Wolverton sitting.

The same rule was announced by the decision of the Hon. R. S. Bean, district judge, in a

case pending in the District Court of the United States for the District of Oregon, No. L-9526, Wanda E. Graham, plaintiff, v. Bowman-Hicks Lumber Company, defendant (unreported), in which Judge Bean gave the following opinion in sustaining a motion directed to the complaint of the widow under the Employers' Liability Act:

> "This is an action to recover damages for the death of plaintiff's husband. The complaint is long, contains numerous allegations, and a motion has been made to strike out a considerable portion of the complaint on the ground that the negligence herein alleged is a common law negligence and does not come within the provisions of the Employers' Liability Act. That act gives the widow the right to bring an action for the death of her husband, where the employer violates or fails to observe some of the provisions or requirements of the act. But this complaint as far as I can understand it, is based wholly upon the common law negligence. It alleges that the defendant failed and neglected to provide this young man with a safe place within which to work. He lost his life by reason of the derailment of a logging train and the charges of negligence are that the company failed and neglected to properly construct its road, to properly operate the trains, to employ competent and experienced servants in operating its trains and matters of that kind, which does not come within the provisions

> of the Employers' Liability Act, and if it were negligent in that respect, the right of action vests in the administrator of the estate and not the widow, and without going into detail as to the various allegations covered by the motion, it seems to me, if I have examined it carefully, that the motion is well-taken, as to the matters embraced in the motion to strike from the complaint, because they have no relation to an action under the Employers' Liability Act."

The rule asserted is that common law negligence cannot be the basis for recovery by a widow or children under the Employers' Liability Act. Although the record in the present case establishes that the edgerman was negligent in lifting the dead rolls without stopping the operation of the machinery, such negligence was common law negligence for which a right of recovery vested in the administrator. It was error on the part of the court below to submit the case to the jury and thereby permit the defendants in error (plaintiffs below) to recover a larger amount of damages than could have been recovered by them through the administrator of the estate of Clyde C. Simpson. In an action filed by the administrator the amount of damages would be limited to $7500. It is sought in the present action to escape such limitation by inserting in the amended complaint charges of negligence consisting of the violation of the Employers' Liability Law which requires an employer to use every device, care and precaution

with respect to the safety of his machinery and to recover upon proof which establishes only common law negligence. The only proof of negligence was that of common law negligence on the part of the edgerman which under the authorities hereinbefore cited furnishes no basis for recovery in the present action.

Conclusion.

It is earnestly submitted that the court below erred in denying the motion of the plaintiff in error for a directed verdict in its favor and in submitting the case to the jury. The proof of negligence on the part of the edgerman was not sufficient to entitle the plaintiffs to have their case submitted to the jury. There was no proof that the failure to observe the duties imposed by the Employers' Liability Law as charged in the amended complaint was the proximate cause of the accident. To permit the judgment of the court below to stand would be to nullify and restrict by judicial interpretation the policy of the State of Oregon that the damages recoverable for death from common law negligence should be limited. The error complained of was prejudicial to the rights of the plaintiff in error and the judgment of the court below should be reversed.

Respectfully submitted,

W. Lair Thompson,
Ralph H. King,
Attorneys for Plaintiff in Error.

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In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

OREGON-AMERICAN LUMBER COMPANY, a corporation,
Plaintiff in Error,
vs.
MABEL SIMPSON and WAYNE DEAN SIMPSON, EARL SIMPSON and JOYCE SIMPSON, minors, by MABEL SIMPSON, their guardian ad litem,
Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR ON MOTION TO STRIKE BILL OF EXCEPTIONS
and
BRIEF OF DEFENDANTS IN ERROR ON THE MERITS

Upon Writ of Error to the District Court of the United States for the District of Oregon.

Names and Addresses of the Attorneys of Record:
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FILED
OCT 31 1925
F. D. MONCKTON,

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Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR ON MOTION TO STRIKE BILL OF EXCEPTIONS

On the Motion to strike Bill of Exceptions, Rule 4 of the Rules adopted by the United States Supreme Court December 22, 1911, reads as follows:

> "Rule 4. The judges of the District Courts in allowing Bills of Exceptions, shall give effect to the following rules:
>
> ---
>
> "2. Only so much of the evidence shall be embraced in the Bill of Exceptions as may be necessary to present clearly the questions of law involved in the rulings to which exceptions are reserved, **and such evidence as is embraced therein shall be set**

forth in condensed and narrative form, save as a proper understanding of the questions presented may require that parts of it may be set forth otherwise."

This rule was discussed by the Circuit Court of Appeals for the Second Circuit in the case of Rosenthal et al v. U. S., 271 Fed. 651, decided December 15, 1920, where the following language appears:

> "We take occasion to say once more that what we find in the present record is not a true Bill of Exceptions, as such Bills are understood in the Federal Courts, and that the practice of printing the whole of the stenographer's minutes, arguments and all, is, under the Federal practice, a waste of a client's money which is strongly disapproved. As has been said it 'is neither lawyerlike nor just to the court or to client.' We have several times before pointed out that Bills of Exceptions are not governed by the rules of the state courts under the Conformity Act. (Comp. St. No. 1537). Buessel v. United States, supra, and Rothman v. United States, 270 Fed. 31, decided at this term."

To the same effect is Linn v. United States, decided April 10, 1918, and reported in 251 Fed. 476-483.

as many other boards had done before, and that Matesco, the man in charge of the edger, raised the rolls to see what was the matter and immediately the board was hurled through the mill, striking deceased with such force as to kill him. Matesco, however, denied that he raised the rolls. At pages 176 and 177 of the record appears the following testimony of the witness Matesco.

"Q. Just tell the jury about how far that piece was through your edger when it went back.

A. Oh, that piece it was through about twenty foot, twenty-two through, was through the machine.

Q. About twenty-two feet had gone through?

A. Yes.

Q. Were the dead rolls down on it?

A. Yes."

The witness was then led on one of the long discussions which makes up the so-called Bill of Exceptions, and did not come back to the subject of what happened immediately before Simpson was hurt until on page 189, he gave the following testimony:

"Q. Tell the jury just what Mr. Simpson was doing and how he was standing.

A. I stay right there you see—yes, I stay here; I hold that lever; when the machine kick back and Mr. Simpson get hit in the left side right there, and it knock him down, this board twelve, fourteen inches, maybe got six, eight foot to go through and split in two when it got kick; the rest of it split in two."

The witness was then led over another long discussion, and again on page 195 came to the discussion of what hapenned to Simpson, and gave the following testimony:

"Q. This piece that hurt Mr. Simpson, it had gone through all but about six feet?

A. Six or eight, I can't tell.

Q. It had gone pretty well through?

A. Yes, sir.

Q. But was still a considerable portion of it, and then it kicked back?

A. Kicked back.

Q. Was there any warning?

A. No, I don't know myself how.

Q. Any chance to give any warning?

A. No, kicked back just like a bullet.

Q. Was going through when all of a sudden kicked back?

A. That is all."

On page 198 the same witness said that after Simpson was hurt he raised the rolls.

It will thus be seen that there was testimony both ways, that is to say: to the effect that Matesco did raise the rolls when the board stuck, and also to the effect that he did not raise the rolls, but that the board came back without warning and without any interference on the part of Matesco.

The evidence offered by defendants in error established conclusively that the propensity of the saw to kick back boards was due to the failure of the rolls to grip the boards with sufficient force, which was occasioned by the defective valves.

The testimony also conclusively established that because of the defective condition of the valves, the rolls did not bear down with sufficient weight on the boards to drive them through the edger, and in order to shake the valves loose and get the benefit of the full weight of the rolls, it was the habit of the operator of the edger to raise the rolls up and drop them down, in an effort to get them to bring sufficient pressure to bear on the boards to drive them through. On

page 67 of the transcript, the witness Fred Nye gave the following testimony:

"Q. What about the manner in which rolls close on a thin board, boards an inch thick?

A. Didn't have much pressure on an inch thick.

Q. How did it work in sawing boards an inch thick? What experence did you have with it here in regard to whether it would take hold of them firmly and drive them through?

A. The board stopped and we had to raise it up and whack down on it with the rolls.

Q. How often did it stop and stick that way?

A. Three or four times in half a day.

Q. How long did that continue, these rolls bucking that way?

A. Oh, well, it continued for a couple of weeks.

Q. Was that condition still existing when Simpson was hurt?

A. It was."

It will thus be seen that the case under the testimony of Nye was one of an employe trying to use a defective machine, and if there was negligence in raising the rolls, it was no more than the effort of the edgerman to make the defective machine work by "whacking" down on the boards with the rolls. This was undoubtedly a dangerous practice, but it was as well as the edgerman could do with the defective machine.

The Oregon Statutes so far as they are relative to this matter, are as follows:

Chapter XIV of Title XXXVIII, Oregon Laws, prescribes the degree of care due from certain employers, and defines the scope of the Employers' Liability Act in the following terms:

> "Section 6785. **Care Required of Owners, Contractors, etc. in Work Involving Risk or Danger.** All owners, contractors, sub-contractors, corporations or persons whatsoever, engaged.....in the operation of any machinery ..... and all dangerous machinery shall be securely covered and protected to the fullest extent that the proper operation of the machinery permits, ... and generally, all owners, contractors, sub-contractors and other persons having charge of or responsible for any work involving a risk or danger to the employees or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life

and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus, or device, without regard to the additional cost of suitable material or safety appliance and devices.

"Section 6788. **Who May Prosecute Action for Damages.** If there shall be any loss of life by reason of the neglects or failures or violations of the provisions of this act by any owner, contractor, or sub-contractor, or any person liable under the provisions of this act, the widow of the person so killed, his lineal heirs or adopted children, or the husband, mother or father, as the case may be, shall have a right of action, without any limit as to the amount of damages which may be awarded; provided, that if none of the persons entitled to maintain such action reside within the state of Oregon, then the executor or administrator of such deceased person shall have a right to maintain such action for their respective benefit in the order above named."

"Section 6789. **Defense of Fellow Servant Doctrine Abrogated.** In all actions brought to recover from an employer for injuries suffered by an employee the negligence of a fellow servant shall not be a defense where the injury was caused or contributed to by any of the following causes,

namely: Any defect in the structure, materials, works, plant or machinery of which the employer or his agent could have had knowledge by the exercise of ordinary care; the neglect of any person engaged as superintendent, manager, foreman, or other person in charge or control of the works, plant, machinery, or appliances; the incompetence or negligence of any person in charge of, or directing the particular work in which the employee was engaged at the time of the injury or death; the incompetence or negligence of any person to whose orders the employee was bound to conform and did conform and by reason of his having conformed thereto the injury or death resulted; the act of any fellow-servant done in obedience to the rules, instructions or orders given by the employer or any other person who has authority to direct the doing of said act."

The Workmen's Compensation Law referred to herein is found in Title XXXVII, Oregon Laws, in which title appears the following:

"Section 6617. **Hazardous Occupations Defined.** The hazardous occupations to which this act is applicable are as follows:

(a) Factories, mills and workshops where power-driven machinery is used.

* * * *

(d) Logging, lumbering and shipbuilding operations;"

"Section 6619. **Definition of Terms Used in Act—Employer may Become Entitled as Workman to Compensation.** In the sense of this act words employed mean as here stated, to-wit:

Mill. 'Mill' means any plant, premises, room or place where machinery is used. . .."

"Employer. The term 'employer,' used in this act, shall be taken to mean any person, firm or corporation, including receiver, administrator, executor or trustee, that shall contract for and secure the right to direct and control the services of any person, and the term 'workman' shall be taken to mean any person, male or female, who shall engage to furnish his or her services subject to the direction or control of an employer."

"Section 6620. **Elective Privilege of Employer not to Accept Act—Loss of Defense of Fellow-servant—Contributory Negligence and Assumption of Risk.** Any employer engaged in any of such hazardous occupations who would otherwise be subject to this act, may on or before June 15th next following the taking effect of this act, file with the commission a statement in writing declaring his election not to contribute to the industrial accident fund hereby created, and thereupon such employer shall be relieved from all obligations to contribute thereto, and such employer shall be en-

titled to none of the benefits of this act, and shall be liable for injuries to or death of his workmen, which shall be occasioned by his negligence, default or wrongful act as if this act had not been passed, and in any action brought against such an employer on account of an injury sustained after June 30th next following the taking effect of this act, it shall be no defense for such employer to show that such injury was caused in whole or in part by the negligence of a fellow-servant of the injured workman, that the negligence of the injured workman other than his willful act, committed for the purpose of sustaining the injury, contributed to the accident, or that the injured workman had knowledge of the danger or assumed the risk which resulted in his injury."

"Section 6639. **Rights Under Employers' Liability Act not Affected.** Nothing in this act shall be deemed to abrogate the rights of the employee under the present employers' liability law, in all cases where the employee, under this act, is given the right to bring suit against his employer for an injury."

The case is brought fairly within the terms of the statutes quoted by the evidence. On pages 64 and 65 of the record, testimony appears, which is undisputed, to the effect that the edgerman, who in this case was the witness Pete Matesco, is the man in charge of the edger, and

is the boss over the two men who assist him, one of whom was the deceased. This brings him squarely within the terms of Section 6789, Oregon Laws, herein quoted, which abolishes the defense of the negligence of a fellow servant in cases where the injury is caused or contributed to by the neglect of "any person engaged as superintendent, manager, foreman or other person in charge or control of the works, plant, machinery or appliances," or "by the incompetence or negligence of any person in charge of or directing the particular work in which the employe was engaged at the time of the injury or death." Matesco was in charge of the machine and he was entitled to direct and control Simpson's services, and Simpson was obliged to obey his orders, so they were not fellow servants within the meaning of the statute.

Plaintiff in error was an "employer" within the definition of the Workmen's Compensation Act. Simpson was a workman within the definition of that Act, and plaintiff in error had elected not to accept the benefits of the Workmen's Compensation Act, and therefore fell squarely within the provisions of that Act, in which it is expressly provided that the defense of negligence of a fellow servant is abolished.

POINTS AND AUTHORITIES.

I.

The question of proximate cause in actions for negligence is ordinarily one for the jury and unless the court can say that there was no statement of the evidence upon which fair-minded men might conclude that the negligence complained of was the proximate cause of the injury, the case cannot be taken from the jury by a peremptory instruction. The weighing of conflicting evidence and the balancing of probabilities is within the province of the jury.

Eliff v. O. R. N. Co., 53 Or. 66-75; 99 Pac. 76.

Knathla v. Ore. Short Line, 21 Or. 136-149; 27 Pac. 91.

Hartvig v. N. P. Lbr. Co., 19 Or. 522, 525; 25 Pac. 358.

Schumaker v. St. Paul, 46 Minn. 39, 43; 48 N. W. 559. 12 L. R. A. 257.

Hayes v. Mich. Gen. Ry Co. 111 U. S. 228, 242. 4 Sup. Ct. 369. 28 Law Ed. 410.

Milwaukee & St. Paul Ry. Co. v. Kellogg, 94 U. S. 469.

R. R. Co. v. Stout, 17 Wallace, 657; 84 U. S. XXI 745.

Randall v. B. & O. R. R. Co., 109 U. S. 478, XXVII 1003.

II.

At common law it was no defense for an employer to show that the negligence of a co-employee contributed with the negligence of the employer to cause an injury. Differently stated, the negligence of a fellow-servant was never a defense in any case where the employer was also negligent.

Kreigh v. Westinghouse C. K. & Co., 214 U. S. 249; 53 Law Ed. 984, 988.

III.

Even if the negligence of Pete Matesco, the man in charge of the edger, did contribute to cause the accident, defendant would still be liable under the statutes quoted.

Section 6789, Oregon Laws.

Section 6620, Oregon Laws.

Camenzind v. Freeland Furn. Co. 89 Or. 158; 174 Pac. 139.

Schulte v. Pacific Paper Co., 69 Or. 334; 135 Pac. 527; 136 Pac. 5.

Estep v. Price, 115 S. E. 861.

Kuraetis v. American Can Co., 136 N. E. 69 (Mass.).

Prowse v. Owens Bottle Co., 120 S. E. 300 (W. Va.).

Salus v. Great Northern Ry., 147 N. W. 1070 (Wis.).

IV.

In actions under the Employers' Liability Act of Oregon, it is sufficient for the plaintiff to show that the accident complained of would probably not have happened but for the defective machinery mentioned in the complaint.

Morgan v. Bross, 64 Or 63, 68; 129 Pac. 118.

ARGUMENT.

THE QUESTION OF PROXIMATE CAUSE WAS FOR THE JURY.

The brief of plaintiff in error is very much like the Bill of Exceptions. Forty-five of its pages are made up of verbatim quotations of testimony in question and answer form. Plaintiff in error seems to complain of the action of trial court, however, upon the general theory that the testimony sustains the inference that the proximate cause of the injury to Simpson was the action of Pete Matesco in raising the rolls. It is certainly sufficient upon this phase of the subject to draw the court's attention to the quoted testimony from the witnesses Nye and Matesco set forth in the statement of facts herein, which clearly establishes that the jury may have found either way on the question of fact whether Matesco did or did not raise the rolls. Plaintiff in error apparently does not challenge the proposition that there was ample evidence to go to the jury on the question whether the machine was not so defective by reason of its valves being out of order as to render it inherently liable to injure workmen engaged about it by throwing boards. This proposition cannot be

seriously questioned, for the testimony of many witnesses established conclusively that the valves were in such condition that they would not permit the rolls to descend on the boards with full force when the boards were of the thickness of that being sawed when deceased was killed. Some of the witnesses were unable to explain just what was the matter with the valves, but they all agreed, including the witness for plaintiff in error, Pete Matesco, that the rolls did not come down freely and that the boards were continually kicking back out of the machine. Sometimes they would just stop and jerking the rolls up and down would so release the valves as to bring sufficient pressure to bear on the boards to force them through, and sometimes they would kick back. Likewise all of the witnesses agree that this failure to rest down upon the boards with full force produced a great liability for the boards to kick back, and that when edgers are in this condition they are prone to kick back and throw boards. That such a condition of the machine constituted a violation of Section 6785, Oregon Laws, is too plain for argument. The use of "every device, care and precaution which it is practicable to use" would certainly have included the repairing of this machine. This condition was certainly a "defect in the structure, materials, works, plant or machinery of which the employer or his agent could have had knowledge by the exercise of ordinary care."

Now, if it be said that the jury took the version of the accident testified to by the witness Fred Nye, and that Matesco raised the rolls, we have the case of an employer using a dangerous, defective machine which should drive the boards through directly, but which, by reason of its defective condition, causes them to balk, and the operator of the machine, in endeavoring to operate it in its defective condition, raises the rolls when the boards do balk so that the two causes combine and unite together to produce the death. All of the witnesses agree that when a board stops in the machine, there is imminent danger that it will be thrown back. To go safely it must continue to go steadily, and the stopping is a danger signal whether the rolls are lifted or not, so that if Nye, from his poor position of advantage, saw clearly what happened, and the rolls were raised before the board flew, the defective condition of the machine was part of the cause of the accident, and the accident was also contributed to by the raising of the rolls.

But this Court is not at liberty to say, nor was the Trial Court at liberty to say, whether the jury thought the rolls were raised or not. We have carefully quoted the testimony of Matesco wherein his version of the happening is given, and he says that the board was going straight through when all of a sudden, without any warning, it was kicked back. On page 177 of the record, being asked with respect to the condition existing at the time the board went back, the question "Were the dead rolls down on

employe, then they have no purpose and merely encumber the Code to no effect.

This is the way we read the legal effect of Judge Wolverton's opinion, and as we have said, we are at a loss to understand just why he struck out the allegations of negligence on the part of Matesco.

The Employers' Liability Act is clearly as broad as the common law as to cases falling within it. A case falls within it, according to Judge Harris in the Camenzind case, when the relation of master and servant exists, when machinery is being used, or when the work involves a risk or danger, and when a case falls within it, there is substituted for the common law rule of ordinary care, the higher degree of care named in the statute. Instead of ordinary care, the rule of care is "every care and precaution practicable," which, of course, includes ordinary care. This is the effect of all the Oregon decisions on the subject.

The result of these considerations is that the defendants in error were the proper parties to commence and prosecute this action upon all of the grounds named in the original complaint, and that their right of recovery for the death of deceased was not limited. If a defective machine was in use, the act was clearly a violation of the Employers' Liability Act; and if the negligence of a fellow servant concurred with the negligence of the employer in using a de-

fective machine, that fact furnished no defense for the employer; and further, even if the court had assumed the province of the jury and said that the proximate cause of the accident was the negligence of the employe in failing to use the degree of care and precaution required by the statute, it still must have followed that there was a violation of the Employers' Liability Act.

The section of the Employers' Liability Act conferring right of action upon the widow and surviving children confers that right for any violation of the terms of the Employers' Liability Act. The pre-existing death statute of the State of Oregon, which is in effect a re-enactment of Lord Campbell's Act, has no applicability to the case, nor does it express the policy of the State of Oregon with respect to the beneficiaries bringing this action. It is idle to say that the policy of the State of Oregon is to limit recovery for death, when the policy of the State of Oregon is, as it must be, expressed in its laws. That was the policy of the State before the Employers' Liability Act and the Workmen's Compensation Act were enacted. It is not the policy of the State under those Acts. The policy of the State under the Employers' Liability Act is expressed in that Act, and is to allow what a jury may assess the damages to be, according to the measure of damages applicable under that Act. The policy of the State under the Compensation Act is to award an income to the surviving family, and

it is only fair to say that that income, in the expectancy of life of the defendants in error, would have very greatly exceeded in value the award of the jury in this case. To create the necessary income some $18,000.00 would have been required to be set aside. So counsel are grossly in error when they say that it is the policy of the State of Oregon to leave the widow and children of a deceased workman, killed as Simpson was killed, dependent upon charity, or to make it possible for employers, by rejection of the Workmen's Compensation Act of the State, followed by hair-splitting quibblings over remote questions of causation, to leave the public charities of the State to carry the burden incurred by the gross negligence of mill operators. The policy of the State is exactly the reverse, and we respectfully submit that the only weakness in the administration of the policy of the State in this cause lies in the fact that the award of the jury was comparatively small.

Respectfully submitted,

LORD & MOULTON,

Attorneys for Defendants in Error.

4680

In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

OREGON-AMERICAN LUMBER COMPANY, a corporation,
Plaintiff in Error,
vs.
MABEL SIMPSON and WAYNE DEAN SIMPSON, EARL SIMPSON and JOYCE SIMPSON, minors, by MABEL SIMPSON, their guardian ad litem,
Defendants in Error.

MOTION TO STRIKE BILL OF EXCEPTIONS

Upon Writ of Error to the District Court of the United States for the District of Oregon.

Names and Addresses of the Attorneys of Record:
W. LAIR THOMPSON,
RALPH H. KING,
Northwestern Bank Building, Portland, Oregon,
for Plaintiff in Error

LORD & MOULTON,
Spalding Building, Portland, Oregon,
for Defendants in Error.

FILED
OCT 31 1925
F. D. MONCKTON
CLERK

In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

OREGON-AMERICAN LUMBER COMPANY, a corporation,
Plaintiff in Error,
vs.
MABEL SIMPSON and WAYNE DEAN SIMPSON, EARL SIMPSON and JOYCE SIMPSON, minors, by MABEL SIMPSON, their guardian ad litem,
Defendants in Error.

MOTION TO STRIKE BILL OF EXCEPTIONS

Come now the above named defendants in error, by their attorneys of record herein, and move the court to strike from the Transcript of Record herein that part thereof purporting to be a Bill of Exceptions, and beginning on page 47 of the printed Transcript of Record at the top of said page, and extending to and including page 271 of said printed Transcript of Record, on the ground and for the reason that the said portion of said Transcript purporting to be a Bill of Exceptions is neither in form

nor substance a Bill of Exceptions, and that the said purported Bill of Exceptions does not comply with Rule 4 of the Rules of the United States Supreme Court adopted December 22, 1911, which said rule, as far as the same is applicable to this cause, reads as fololws:

> "Rule 4. The judges of the District Courts, in allowing Bills of Exceptions, shall give effect to the following rules:
> * * * *
>
> "2. Only so much of the evidence shall be embraced in the Bill of Exceptions as may be necessary to present clearly the questions of law involved in the rulings to which exceptions are reserved, **and such evidence as is embraced therein shall be set forth in condensed and narrative form, save as a proper understanding of the questions presented may require that parts of it may be set forth otherwise."**

This motion is further made upon the ground that there is included in said document purported to be a Bill of Exceptions, two hundred twenty-four pages of printed matter, including the whole of the reporter's transcript of the proceedings had; testimony taken, rulings of the Court and instructions to the jury in said cause, with no segregation thereof, not in condensed or narrative form, and that there is not set forth in said purported Bill of Exceptions any statement of any exception to

any ruling of the Court, nor does the Court in the certificate to said purported Bill of Exceptions, certify that any exceptions were taken or allowed, nor in anywise settle or certify any exceptions, or do other than to certify that the document contains all the evidence upon the trial of the action.

Respectfully submitted,

LORD & MOULTON,

Attorneys for Defendants in Error.

4680

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

OREGON-AMERICAN LUMBER COMPANY, a Corporation,
Plaintiff in Error,

v.

MABEL SIMPSON and WAYNE DEAN SIMPSON, EARL SIMPSON and JOYCE SIMPSON, minors, by MABEL SIMPSON, their guardian *ad litem*,
Defendants in Error.

Memorandum of Authorities Opposing Motion to Strike Bill of Exceptions

Upon Writ of Error to the District Court of the United States for the District of Oregon.

Names and Addresses of Attorneys of Record:

W. LAIR THOMPSON,
RALPH H. KING,
Northwestern Bank Bldg.,
Portland, Oregon,
For Plaintiff in Error.

LORD & MOULTON,
Spalding Bldg.,
Portland, Oregon,
For Defendants in Error.

FILED
OCT
F. D.

F. W. BALTES AND COMPANY, PRINTERS, PORTLAND

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

OREGON-AMERICAN LUMBER COMPANY, a Corporation,
Plaintiff in Error,

v.

MABEL SIMPSON and WAYNE DEAN SIMPSON, EARL SIMPSON and JOYCE SIMPSON, minors, by MABEL SIMPSON, their guardian *ad litem*,
Defendants in Error.

Memorandum of Authorities Opposing Motion to Strike Bill of Exceptions

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Upon Writ of Error to the District Court of the United States for the District of Oregon.

On October 19th, four days before the date this cause is set for hearing in this court, the defendant in error served upon plaintiff in error a motion to strike the bill of exceptions. The only ground of the motion that is argued upon the brief of defendant in error in support of the motion is that the bill of exceptions does not conform to Subdivision 2 of Rule 4 of the Supreme Court of the United States.

We think the motion to dismiss is not well taken on a number of grounds and will briefly refer to them.

1. This writ of error is prosecuted because of the refusal of the trial court to direct a verdict for the

defendant. An exception to the refusal was duly reserved, is certified by the trial judge in the bill of exceptions and is the only exception that is presented by the plaintiff in error. We believe it is elementary that the consideration of such an exception requires bringing before the appellate court all of the evidence taken in the court below. It has been so ruled by this court and by the United States Supreme Court.

First National Bank v. Moore, (9th C. C. A.) 148 Fed. 953.

Crowe v. Trickey, 204 U. S. 235, 51 L. Ed. 458.

It has been so ruled in the eighth circuit.

National Masonic Acc. Ass'n v. Shryock, 73 Fed. 774, 777.

Gulf, C. & S. F. R. Co. v. Washington, 49 Fed. 347, 353.

The defendant in error has failed to distinguish between a case in which exceptions are reserved and assignments based thereon to rulings on the admission of evidence and upon the instructions as to the law given or refused. Such are the cases of *Rosen et al v. U. S.,* 271 Fed. 651, and *Linn v. U. S.,* 251 Fed. 476, 483, both of which arose in the second circuit and in neither of which was there presented a motion for directed verdict. Each of those cases involved numerous assignments of error going to particular rulings and the complaint was that the entire record was taken up when only that portion of the record

referring to the particular rulings assigned as error should have been submitted to the appellate court.

2. The bill of exceptions in this case conforms to the rules of this court and this court has the exclusive right to make its own rules governing law actions.

Rule 10 of this court provides the form and contents of a bill of exceptions and in that rule this court adopts only Subdivision 1 of Rule 4 of the Supreme Court of the United States. This court has not seen fit to adopt the second subdivision of Rule 4 of the Supreme Court of the United States, providing the manner in which the bill of exceptions shall be made. We submit that when this court eliminates from its rules the suggestion of the United States Supreme Court contained in Subdivision 2 of Rule 4 of that court it is notice to the bar that Rule 4 of the United States Supreme Court is not in its entirety adopted here. This immediately raises the question whether it is competent for this court to make its own rules (even though its rules do not place the same limitations upon procedure that obtain in the United States Supreme Court) and whether it is competent for the United States Supreme Court to make rules governing this court in law actions.

We all know that Section 917, Revised Statutes, gives to the United States Supreme Court plenary power to prescribe rules governing the practice in all of the federal courts in suits in equity or admiralty.

Pursuant thereto such rules have been prescribed governing the procedure in equity and admiralty in the district and circuit courts and the same is true of the authority granted in the bankruptcy act.

This is not true of law actions. For some years there has been a movement put forth by the American Bar Association to grant this power to the supreme court as to actions at law. However, congress has not seen fit to extend this authority to the supreme court. It is elementary that in the absence of statutory restrictions each court has authority to make rules of procedure for itself, and in the absence of a statute granting such authority to the supreme court it may not make rules governing procedure in inferior courts (15 *Corpus Juris* 904).

Now, then, congress has given to the Circuit Court of Appeals for the Ninth Circuit plenary power to make its own rules. Section 122 of the judicial code provides:

> "Each of said circuit courts of appeals shall prescribe the form and style of its seal and the form of writs and other process and procedure * * * and shall have power to establish all rules and regulations for the conduct of the business of the court. * * *"

Pursuant to this statutory authorization this court has promulgated Rule 10, calculated to limit a bill of exceptions so that the record may present the particular question of law suggested on appeal, and elimi-

nates an exception to the instructions *in solido*. This court has not changed the rule that all of the record must be brought up for a proper consideration of an exception based upon a refusal to direct a verdict and it has not seen fit to adopt that portion of Rule 4 of the United States Supreme Court requiring that the evidence in the bill of exceptions be presented by recital.

We seriously doubt whether a bill of exceptions containing any thing short of all of the evidence in the case would be sufficient to raise the question of error in denying a directed verdict in the Supreme Court of the United States, in a case of the nature that could reach that court. However that may be, Rule 4 of the Supreme Court of the United States, valid as a rule of that court, suggestive and admonitory to the district courts, is hardly binding upon this court, which by law is granted power to make its own rules. In any event, until this court has seen fit to advise the bar that it has adopted the rule of the United States Supreme Court, it would hardly be an act of justice to cast out of court a litigant who observes the rules of this court.

W. Lair Thompson,
Ralph H. King,
Attorneys for Plaintiff in Error.

No. 4681

United States

Circuit Court of Appeals

For the Ninth Circuit.

13

NATIONAL LIBERTY INSURANCE COMPANY OF AMERICA, a Corporation,

Plaintiff in Error,

vs.

W. A. MILLIGAN,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

FILED
OCT 2 - 1925
F. D. MONCKTON,
CLERK

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 4681

United States

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For the Ninth Circuit.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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EXHIBITS—Continued:

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NAMES AND ADDRESSES OF COUNSEL.

Messrs. BATTLE, HULBERT, GATES, & HELSELL, Attorneys for Plaintiff in Error,
901 Alaska Building, Seattle, Washington.

ROBERT A. HULBERT, Esquire, Attorney for Plaintiff in Error,
901 Alaska Building, Seattle, Washington.

FRED G. CLARKE, Esquire, Attorney for Plaintiff in Error,
1115 Alaska Building, Seattle, Washington.

ELIAS A. WRIGHT, Esquire, Attorney for Defendant in Error,
631 Burke Building, Seattle, Washington.

SAM A. WRIGHT, Esquire, Attorney for Defendant in Error,
631 Burke Building, Seattle, Washington.

[1*]

*Page-number appearing at foot of page of original certified Transcript of Record.

In the Superior Court of the State of Washington, in and for the County of King.

No. 176,465.

W. A. MILLIGAN,

Plaintiff,

vs.

NATIONAL LIBERTY INSURANCE COMPANY OF AMERICA, a Corporation,

Defendant.

COMPLAINT.

8952.

Comes now the plaintiff and for cause of action against the defendant says:

I.

That the plaintiff is a resident of King County, State of Washington.

II.

That the defendant is a corporation duly organized and existing and is doing a general fire insurance business in the State of Washington, being authorized and licensed so to do under the laws of the State of Washington, and at all the times herein mentioned has been doing business within King County, State of Washington.

III.

That at all the times hereinafter mentioned one E. R. Voorhies was the duly authorized agent of the defendant at Morton, Washington.

IV.

That heretofore, to wit, on or about the 23d day of July, 1924, in consideration of the sum of five hundred dollars ($500) to the defendant through its duly authorized agent, E. R. Voorhies, in hand paid by the plaintiff, the defendant did orally enter into a contract of fire insurance wherein and [2] whereby the defendant agreed to and did insure the plaintiff against all direct loss of damage by fire for a period of one year from the 23d day of July, 1924, at noon, to the 23d day of July, 1925, at noon, to an amount not exceeding the sum of ten thousand dollars ($10,000.) in respect to the property insured, which said insurance was segregated as follows:

> $6,000.00 on the building situated on the north half of the east half of lots 1 and 2, and all of lot 11, block 4, in the Town of East Morton, Washington, being on the corner of 2d Avenue and 2d Street, and the alley in the Town of Morton, or East Morton, Washington,

and which was a hotel building then owned and being operated by the plaintiff; and

> $4,000.00 on the hotel or apartment or boarding or lodging house furniture, fixtures and furnishings, building materials, etc., and the residence furniture, fixtures and equipment, the pool hall furniture, fixtures and equipment, and

the barber shop furniture, fixtures and equipment, and all of which said personalty was likewise situated and located in the hotel building above referred to, and which said hotel building is further described as "facing east on 2d Street, Morton, Washington," fire map Block 13, Nos. 37, 38 and 39.

V.

That at and during all of the times herein mentioned the plaintiff, W. A. Milligan, was the sole owner of said insured property save and except that there was a mortgage on the real property owned and held by the Pacific Savings & Loan Association, and a chattel mortgage on the personalty owned and held by one S. J. Bergen, neither of which mortgages however were or are interested in this insurance, and were otherwise secured, and all of which was know to the defendant and its agent, E. R. Voorhies.

VI.

That on the 26th day of July, 1924, at about the hour of 1 o'clock A. M., a fire occurred whereby all of the said insured property, both the building insured and all of the personal [3] property covered by said oral contract of insurance hereinbefore referred to was completely destroyed by the said fire, and that the value of the building so destroyed was at least the sum of $25,000, and the value of the personal property so destroyed was at least the sum of $10,000.00.

VII.

That at the time of said fire and at the time of the destruction thereof and damage thereto, as aforesaid, all of the property referred to in said oral contract of insurance was located and contained in the place agreed upon in said oral contract of insurance, and not elsewhere.

VIII.

That after said fire, immediate notice thereof was given to the defendant, and the premium on said contract of insurance was paid by the plaintiff and received by the said defendant through its duly authorized agent, E. R. Voorhies, which said premium in the sum of $500 defendant still retains and now has. That plaintiff promptly furnished defendant with due proof of said loss, wherein he claimed and stated said loss to be in the sum of $10,000, and claimed of and from the defendant under said oral contract of insurance hereinabove referred to, the aggregate sum of $10,000.

IX.

That the defendant however has denied the said oral contract of insurance in every particular, but still retains the premium for insurance which plaintiff has paid to it.

X.

That the plaintiff has in all respects performed and complied with all the terms, conditions and provisions of said oral contract of insurance on his part to be performed or complied with, and that there is now due and owing unto him under and

by virtue of said oral contract of insurance the full sum of $10,000.00 from the defendant, demand for payment of which has [4] been made upon the defendant, but payment of which has not been made but on the other hand has been absolutely refused by the defendant, and by virtue of the premises plaintiff alleges that the defendant is indebted unto him in the full sum of $10,000.00.

WHEREFORE plaintiff prays for judgment against the defendant in the full sum of $10,000, together with interest thereon from this date until paid, and for his costs and disbursements in this action expended.

WRIGHT & WRIGHT,
Attorneys for Plaintiff.

State of Washington,
County of King,—ss.

W. A. Milligan, being first duly sworn, on oath deposes and says: That he is the plaintiff named in the above-entitled action; that he has read the foregoing complaint, knows the contents thereof and believes the same to be true.

W. A. MILLIGAN.

Subscribed and sworn to before me this 19th day of August, 1924.

SAM A. WRIGHT,
Notary Public in and for the State of Washington,
Residing at Seattle.

Filed in County Clerk's Office, King County, Wash. Aug. 25, 1924. George A. Grant, Clerk. By A. L. Lawrence, Deputy.

[Endorsed]: Oct 27, 1924. [5]

[Title of Court and Cause.]

ORDER OF REMOVAL.

This cause having come on for hearing this day upon the petition of the defendant National Liberty Insurance Company of America, a corporation, for removal of this cause to the United States District Court for the Western District of Washington, Northern Division, and said petition having been filed within the time provided by law, and the petitioner having, at the same time, offered its bond in the sum of Five Hundred Dollars ($500.00) with the Standard Accident Insurance Company, of Detroit, Michigan, a good and sufficient surety, conditioned according to law, and due notice of presentation and filing the said petition and bond having been given to the plaintiff, and the parties appearing by their respective counsel, and the Court being fully advised in the premises,—

IT IS HEREBY ORDERED that this Court does hereby accept and approve said bond and accept said petition and does order that this cause be removed from this court to the District Court of the United States for the Western District of Washington, Northern Division, pursuant to the statutes of the United States relative thereto, and that all other proceedings in this court be stayed.

Done in open court this 4th day of October, 1924.

MITCHELL GILLIAM,
Judge.

Copy of within order received and service of the same acknowledged this 1st day of October, 1924.

WRIGHT & WRIGHT,
Attorneys for Pltf.

Filed in County Clerk's Office, King County, Wash. Oct. 4, 1924. George A. Grant, Clerk. By A. L. Lawrence, Deputy.

[Endorsed]: Oct. 27, 1924. [6]

[Title of Court and Cause.]

ANSWER.

Comes now the above-named defendant and for answer to plaintiff's complaint herein admits, denies and alleges:

I.

Defendant admits the allegations contained in Paragraph II, of plaintiff's complaint.

II.

Defendant denies each and every allegation contained in Paragraph III, IV and V of plaintiff's complaint.

III.

Defendant denies any knowledge or information sufficient to form a belief as to the allegations contained in Paragraph VI of plaintiff's complant and therefore denies the same.

IV.

Defendant denies each and every allegation contained in Paragraphs VII, VIII and IX of plaintiff's complaint, except that it is admitted that said plaintiff, through his attorneys, Wright and Wright, mailed to one E. R. Vorhies a check in the sum of Five Hundred Dollars ($500.00) and alleges that said Vorhies thereafter returned said check to the plaintiff through his said [7] attorneys; it is admitted that defendant has denied and still denies that there was any oral contract or contract of any kind of insurance as alleged in plaintiff's complaint or at all and denies that it still retains or ever received the premium for insurance which the plaintiff alleges that he paid.

V.

Answering Paragraph X of plaintiff's complaint this defendant denies that there was any oral contract as therein alleged or at all; denies that there is Ten Thousand Dollars ($10,000) due or owing to the plaintiff or any other sum whatsoever; defendant admits that it refuses to pay the plaintiff Ten Thousand Dollars ($10,000) or any other sum on account of any alleged or pretended oral insurance contract.

FOR A FURTHER SEPARATE DEFENSE THIS DEFENDANT ALLEGES:

I.

That the fire mentioned in plaintiff's complaint and the damage resulting therefrom, if any, was procured and caused by the willful and malicious

act of the plaintiff in setting or causing said fire to be started for the purpose and in an attempt to defraud this defendant and other insurance companies by seeking to compel defendant and others to pay to the plaintiff fire insurance for alleged damage done by reason of such fire.

WHEREFORE, defendant prays that plaintiff take nothing by reason of his complaint and that said action be dismissed with costs to this defendant.

FRED G. CLARKE,
BATTLE, HULBERT, GATES & HELSELL,
Attorneys for Defendant. [8]

State of Washington,
County of King,—ss.

Evart Lamping, being first duly sworn, on oath deposes and says: That he is the President and Manager of Lamping & Company, a corporation, agent of the defendant insurance company, and makes this verification by authority for and in its behalf; that he has read the foregoing answer, knows the contents thereof and believes the same to be true.

EVART LAMPING.

Subscribed and sworn to before me this 20th day of November, 1924.

[Seal] SHIRLEY F. HARWOOD,
Notary Public in and for the State of Washington,
Residing at Seattle.

Copy rec'd Nov. 21, 1924.

WRIGHT & WRIGHT,
Attys. for Plaintiff.

[Endorsed]: Filed Nov. 21, 1924. [9]

[Title of Court and Cause.]

REPLY.

Comes now the plaintiff and by way of reply to the alleged further separate defense of the defendant, says:

I.

He denies Paragraph I of the said so-called separate defense, and each and every part thereof.

WHEREFORE, having fully replied, plaintiff prays as by his complaint herein on file.

WRIGHT & WRIGHT,
Attorneys for Plaintiff. [10]

United States of America,
State of Washington,
County of King,—ss.

W. A. Milligan, being first duly sworn, on his oath deposed and says: That he is the plaintiff named in the above-entitled action; that he has read the above and foregoing reply, knows the contents thereof, and that the same is true.

W. A. MILLIGAN.

Subscribed and sworn to before me this 21st day of November, 1924.

[Seal] SAM A. WRIGHT,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Receipt of a copy of the within reply and due service admitted this 24 day of Nov., 1924.

BATTLE, HULBERT, GATES & HELSELL,

Attorneys for Deft.

Filed Nov. 24, 1924. [11]

[Title of Court and Cause.]

VERDICT.

We, the jury in the above-entitled cause, find for the plaintiff, and assess his recovery in the sum of Ten Thousand & no/100 Dol. ($10,000.00) Dollars.

A. H. BRACKETT,

Foreman.

[Endorsed]: Filed Jun. 3, 1925. [12]

In the District Court of the United States, Western District of Washington, Northern Division.

No. 8952.

W. A. MILLIGAN,

Plaintiff,

vs.

NATIONAL LIBERTY INSURANCE COMPANY OF AMERICA, a Corporation,

Defendant.

JUDGMENT.

BE IT REMEMBERED that the above-entitled matter came on regularly for trial before the undersigned Judge of the above-entitled court sitting with a jury of twelve jurors regularly chosen and selected in the manner as provided by law, on the 3d day of June, 1925. The plaintiff at said time appearing in person with his witnesses and through his attorneys of record herein, Elias A. Wright, and Sam A. Wright, and the defendant appearing with its witnesses, and through its attorneys of record, R. A. Hulbert, of the firm of Battle, Hulbert, Gates and Helsell, and Fred G. Clarke, whereupon a trial was had, the jury being duly and regularly selected to try the cause, and evidence having been introduced by the respective parties herein and the cause having been argued to the jury by respective counsel for both parties, and the jury having been duly instructed as to the law by the Court, and hav-

ing thereupon retired to deliberate upon its verdict, and having deliberated thereupon, returned into open court on June 3, 1925, with its verdict in due and regular form, in which verdict the said jury found in favor of the plaintiff, and against the defendant in the full sum of $10,000.00, and the said verdict having been duly received by the Court and filed herein, and the attorneys of record for the plaintiff now in open court, having moved for the entry of a judgment upon said verdict, and the Court being fully advised in the premises, it is hereby [13]

ORDERED, ADJUDGED and DECREED that in pursuance of said verdict so rendered, the plaintiff do have and recover a judgment against the defendant in the above-entitled action, in the full sum of $10,000.00 together with interest thereon, at the rate of 6% per annum from August 19, 1924, together with his costs and disbursements in the sum of $327.35, to be taxed, by the Clerk of this court, in the manner as provided by law, and when so taxed to become a part of this judgment, and it is further

ORDERED, ADJUDGED and DECREED that the plaintiff may have immediate execution therefor.

Done in open court this 15 day of June, 1925.

BOURQUIN,
Judge.

[Endorsed]: Filed Jun. 15, 1925. [14]

[Title of Court and Cause.]

MOTION FOR NEW TRIAL.

Now comes defendant by its counsel and moves the Court to set aside the verdict of the jury heretofore rendered herein and to grant a new trial in this cause for the following reasons:

I.

That the evidence in the case is insufficient to justify the verdict against the defendant.

II.

That the verdict is contrary to and against the law.

III.

The Court gave improper instructions to the jury.

IV.

The Court improperly denied the defendant's motion for preemptory instructions at the close of all of the evidence and refused to give to the jury the preemptory instructions offered by the defendant.

V.

The Court erred in denying the defendant's challenge to the sufficiency of the evidence and direct a verdict in favor of the defendant or withdraw the case from the jury and enter [15] judgment in favor of the defendant at the close of all of the evidence in the case.

VI.

The Court erred in refusing to consider the defendant's challenge to the sufficiency of the evi-

dence at the close of all of the evidence in the case and denying defendant's said challenge upon the ground that no demurrer had been interposed to the complaint which showed that the action was one upon an alleged oral contract of fire insurance.

VII.

The Court erred in instructing the jury that an oral contract of fire insurance is valid in the State of Washington.

VIII.

The Court erred in its instruction to the jury that E. R. Vorhies, the alleged agent of the defendant company, had authority to bind the defendant company on an oral contract of fire insurance; and that an oral contract of fire insurance made by the alleged agent was enforcible against the defendant company.

IX.

The Court erred in admitting incompetent, irrelevant, immaterial and improper evidence offered in behalf of the plaintiff over the objections and exceptions of defendant duly made at the time.

X.

Because under the pleadings and all of the evidence in the case, the verdict should have been in favor of the defendant.

BATTLE, HULBERT, GATES & HELSELL,

FRED G. CLARKE,

Attorneys for Defendant.

Copy received.

WRIGHT & WRIGHT,
By E. AYERST.

[Endorsed]: Filed Jun. 5, 1925. [16]

[Title of Court and Cause.]

OPINION AND ORDER OVERRULING MOTION FOR NEW TRIAL.

Plaintiff sued upon an oral contract of fire insurance for one year. The proof is of an agreement to insure, effective from time made, which was to be but was not reduced to writing; and so, is presumed to be a contract of usual or statutory conditions and form. That is to say, the agreement so far as instant effect is concerned, is analogous to the usual binding slip or receipt. In this is no material if any variance. As in case of any like contract, it could be declared upon as oral. The complaint disclosed that the contract is oral, and without any preceding challenge of its sufficiency, the case occupied the larger part of the day of judge and jury in its trial. At the conclusion of the evidence, the defendant moved for a directed verdict upon the ground that the contract is void for that oral insurance is prohibited by the local law. The practice is not tolerable (U. S. vs. Herrig, 204 Fed. 125), and the motion was denied. The verdict for plaintiff. On the same ground, the only one urged, defendant moves for a new trial.

Denied. That oral contracts of insurance, like this at bar are not void by reason of local statutes, is supported by principle and great weight of authority. See

Kittler case, 126 Wash. 478;
Way case, 74 Wash. 332;
Relief case, 94 U. S. 574.

It is the rule of contracts and statutes in general. The common law right to orally contract or insure is not abrogated by [17] statute farther than the statutory language requires. If the legislature had intended oral contracts of insurance to be void, it could have easily and plainly said so. So far as the agent's authority went, see Schumacher vs. Ins. Co., 2 Fed. (Ind.) 510, and its citation of the Sup. Ct. Any limitation upon his power to affect all lawful insurance, was not brought to plaintiff's knowledge.

BOURQUIN, J.

June 16, 1925.

[Endorsed:] Filed Jun. 16, 1925. [18]

[Title of Court and Cause.]

TIME GRANTED TO FILE BILL OF EXCEPTIONS.

Now on this 12th day of June, 1925, both sides being represented by counsel, on motion of defendant both sides are granted ten days from and after the Court's disposition of the motion for a new trial

herein in which to serve and lodge proposed bill of exceptions.

Journal #13, at page 394. [19]

[Title of Court and Cause.]

DEFENDANT'S PROPOSED BILL OF EXCEPTIONS.

BATTLE, HULBERT, GATES & HELSELL,

ROBT. A. HULBERT,
FRED G. CLARKE,
Attorneys for Defendant. [20]

[Title of Court and Cause.]

DEFENDANT'S PROPOSED BILL OF EXCEPTIONS.

FIRST EXCEPTION.

BE IT REMEMBERED that the above-entitled and numbered cause came on for trial before the Honorable George M. Bourquin, one of the Judges of the United States District Court, sitting in the above-entitled court at the Federal Building, in the City of Seattle, State of Washington, at the hour of 10 o'clock A. M., June 3, 1925; the plaintiff appearing by his attorneys Messrs. Wright and Wright, and the defendant appearing by its attorneys, Messrs. Battle, Hulbert, Gates & Helsell and Mr. Fred G. Clarke, both sides having announced that they were ready for trial, a jury was duly and regularly impaneled to try said cause, and at the

close of all of the evidence and prior to the submission of the case to the jury, the defendant challenged the sufficiency of the evidence to sustain a verdict for the plaintiff and asked the Court to direct a verdict in favor of the defendant under the statutes of this state or withdraw the case from the jury and enter judgment for the defendant, for the reason that the evidence is wholly insufficient to support any verdict or [21] judgment in favor of the plaintiff against the defendant, and particularly upon ground that under the statute and the law of this state, an oral contract of fire insurance is not valid and cannot be enforced. In other words, that fire insurance must be in writing on the standard form. Upon the further ground that an agent created by the statute is only authorized to do those things the statute delegates or gives him the power to do, and right to do, and his right and power are clearly for the purpose of soliciting and effecting insurance in the manner provided by the statute, namely the granting or issuing of policies countersigned by himself as agent, on the statutory form.

Such request and motion of the defendant were denied by the court and to the denial thereof, the defendant duly excepted and its exception was allowed.

The defendant submits the following stenographic report of the trial herein, consisting of pages 3 to 99, inclusive, which is all the evidence and testimony introduced upon the trial of said cause, together with all objections and exceptions made and taken to the admission or exclusion of testimony

and all motions, offers to prove and admissions and rulings thereon, together with all exhibits, being Plaintiff's Exhibits 1 to 10, inclusive, and Defendant's Exhibits "A" to "E," inclusive, referred to and received in evidence as a bill of exceptions in support of said first exception. [22]

TESTIMONY OF H. O. FISHBACK, FOR PLAINTIFF.

H. O. FISHBACK, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By SAM A. WRIGHT.)

Q. Please state your name.

A. H. O. Fishback.

Q. What is your official connection with the State of Washington?

A. I am State Insurance Commissioner.

Q. And how long have you been such?

A. Since January, 1913.

Q. You live at Olympia, of course?

A. Yes, sir.

Q. At my request have you produced certain of your records in reference to the authorization of the National Liberty Insurance Company of America to do business in this State and the appointment of some of their agents? A. I have them here.

Q. Have you with you the certificate of authority issued—

(Testimony of H. O. Fishback.)

Mr. HULBERT.—We will admit, to save time, that the National Liberty Insurance Company of America was authorized to do business in this State.

The COURT.—Very well.

SAM A. WRIGHT.—In this kind of insurance?

Mr. HULBERT.—What do you mean by that?

Mr. SAM A. WRIGHT.—Fire insurance. [23]

Mr. HULBERT.—Fire insurance.

Q. (Mr. SAM A. WRIGHT.) Have you, Mr. Fishback, the certificate of appointment by the National Liberty Insurance Company of America of Hilbert A. Clark as the manager of the Western Department of that company? A. Yes, sir.

Q. That certificate of appointment is on file in your office? A. Yes, sir.

Q. Handing you Plaintiff's Exhibit "1," is that a certified copy of that appointment?

Mr. HULBERT.—We admit that the company is authorized to do a fire insurance company business in and under the laws of the State of Washington.

Mr. SAM A. WRIGHT.—You deny the agency of Mr. Voorhees, and this is a matter leading up to that.

The COURT.—Very well. It shows for itself.

Mr. HULBERT.—We do not deny that he was appointed agent, but we do deny that he was authorized to write the contract of insurance claimed in this case.

Q. (Mr. SAM A. WRIGHT.) Have you the agent's authorization signed by Hilbert A. Clark

dated April 7th, 1923?

The COURT.—Are you proposing to produce a certified copy of it?

Mr. SAM A. WRIGHT.—Yes.

The COURT.—Then just offer the instrument. [24]

Mr. SAM A. WRIGHT.—I will offer in evidence a certified copy of a requisition and request for the issuance of an agent's license upon the requisition of Lamping & Company, a request by Hilbert A. Clark to honor requisitions for agent's license upon the request of Lamping & Company, general agents of this defendant company.

The COURT.—And who is Mr. Clark?

Mr. SAM A. WRIGHT.—Mr. Clark is the manager of the Western District of this Department as shown by the Plaintiff's Exhibit "1."

The COURT.—Manager of this district for whom?

Mr. SAM A. WRIGHT.—For the defendant company in this state. I will offer it in evidence and also offer in evidence a duly certified copy of the appointment of Lamping & Company as general agents for the defendant company for the State of Washington. I will offer in evidence a duly certified copy of a requisition for, and a list of applications for the renewal of agents' licenses dated March 21, 1924, of the National Liberty Insurance Company under the request and upon the application of Lamping & Company, which shows the request for the appointment of E. R. Voorhees as

agent for the defendant company. I will also offer in evidence a duly certified copy of Edward R. Voorhees' insurance agent's license for this defendant, dated April 15, 1924, being for a [25] period up to and including March 31, 1925.

Mr. HULBERT.—We have no objection.

The COURT.—They will be admitted.

(Documents above referred to admitted in evidence as Plaintiff's Exhibits 1, 2, 3, 4 and 5 respectively.)

PLAINTIFF'S EXHIBIT No. 1.

#8952. Plffs. Exhibit 1. Admitted.

No. 1187.

STATE OF WASHINGTON,

Department of Insurance,

Olympia.

I, H. O. FISHBACK, State Insurance Commissioner, do hereby certify that I am the state official charged with the general control and supervision of all insurance business (except State Workmen's Compensation) transacted in the State of Washington and charged with the administration of the laws relating to insurance in said jurisdiction, and that this office is a department of record, having the custody of original documents.

I FURTHER CERTIFY, That the within and annexed document is a full, true and correct copy of the appointment of HERBERT A. CLARK, of

Chicago, Illinois, as Manager of the Western Division of the NATIONAL LIBERTY INSURANCE COMPANY OF AMERICA, of New York, New York, as the same appears on file with this Department.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of the Insurance Department of the State of Washington, this 21st day of January, 1925.

[Seal] H. O. FISHBACK,
State Insurance Commissioner.
By ————————,
Deputy Commissioner.

APPOINTMENT OF GENERAL AGENT

for

State of Washington.

KNOW ALL MEN BY THESE PRESENTS, That the National Liberty Insurance Company of America, a corporation, organized under the laws of the State of New York, and being authorized to, or proposing to be authorized to carry on the business of insurance in the State of Washington, has constituted and appointed, and by these presents does constitute and appoint Herbert A. Clark, Manager Western Department of Chicago, State of Illinois, its General Agent and/or Manager for the State of Washington. Giving and granting unto the said Herbert A. Clark, the powers to act as General Agent and/or Manager for said company, and

in its name, place and stead, to receive on behalf of said company, from the Insurance Commissioner of the State of Washington, any and all copies of process served upon such Insurance Commissioner in proceedings or actions brought against said company in the State of Washington, and in its name to file and/or adopt rates as required by the laws of the State of Washington, and to do and perform all acts in the execution and prosecution of the business of said National Liberty Insurance Company, in the State of Washington, in as full and ample a manner as the said Company might itself do.

IN WITNESS WHEREOF, The National Liberty Insurance Company of America, by resotion of its Board of Directors, duly made and passed at a regularly called meeting thereof, and/or as provided by its by-laws, has caused these presents to be subscribed and its corporate name and seal to be affixed hereto, this twelfth day of September, 1923.

NATIONAL LIBERTY INSURANCE COMPANY.

By CHAS. H. COATES,
President.

Attest: WM. G. ARMSTRONG,
Secretary.

[Corporate Seal]

"National Liberty Insurance Company of America."

25¢ Revenue Stamp. Canceled.

A fee of $1.00 is required for filing this document. Attach and cancel 25¢ Revenue Stamp.

Filed in the Office of the Insurance Commissioner of the State of Washington, Sept. 24, 1923, at —— o'clock ——. H. O. Fishback, Commissioner. By H.

No. 4681. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 31, 1925. F. D. Monckton, Clerk.

PLAINTIFF'S EXHIBIT No. 2.

#8952. Plffs. Exhibit 2. Admitted.

No. 1188.

STATE OF WASHINGTON,

Department of Insurance,

Olympia.

I, H. O. FISHBACK, State Insurance Commissioner, do hereby certify that I am the state official charged with the general control and supervision of all insurance business (except State Workmen's Compensation) transacted in the State of Washington and charged with the administration of the laws relating to insurance in said jurisdiction, and that this office is a department of record, having the custody of original documents.

I FURTHER CERTIFY, That the within and annexed document is a full, true and correct copy of the appointment of LAMPING AND COMPANY, Inc., of Seattle, Washington, as General Agents to request licenses for the NATIONAL

LIBERTY INSURANCE COMPANY OF AMERICA, of New York, New York, (Washington Underwriters Department), as the same appears on file with this Department.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of the Insurance Department of the State of Washington, this 21st day of January, 1925.

[Seal] H. O. FISHBACK,
State Insurance Commissioner.
By ————————,
Deputy Commissioner.

NATION LIBERTY (WASHINGTON UNDERWRITERS).
(Name of Company)

April 27, 1923.

Insurance Commissioner,
State of Washington,
Olympia.

Dear Sir:

Please honor requisitions for Agent's Licenses on behalf of this Company, applied for in the name of the Company by Lamping & Company, Inc., General Agents, with headquarters at Colman Bldg., Title of Office
Seattle, State of Washington, and oblige,

Yours truly,

[Seal] H. A. CLARK,
Manager.

Received Insurance Department May 11, 1923.
H. O. Fishback, Commissioner.

No. 4681. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 31, 1925. F. D. Monckton, Clerk.

PLAINTIFF'S EXHIBIT No. 3.

#8952. Plffs. Exhibit 3. Admitted.

No. 1186.

STATE OF WASHINGTON,

Department of Insurance,

Olympia.

I, H. O. FISHBACK, State Insurance Commissioner, do hereby certify that I am the state official charged with the general control and supervision of all insurance business (except State Workmen's Compensation) transacted in the State of Washington and charged with the administration of the laws relating to insurance in said jurisdiction, and that this office is a department of record, having the custody of original documents.

I FURTHER CERTIFY, That the within and annexed document is a full, true and correct copy of the appointment of LAMPING AND COMPANY, Inc. of Seattle, Washington, as General Agents for the NATIONAL LIBERTY INSURANCE COMPANY OF AMERICA, of New York, New York, as the same appears on file with this Department.

IN WITNESS WHEREOF, I have hereunto set by hand and affixed the official seal of the Insurance

Department of the State of Washington, this 21st day of January, 1925.

[Seal] H. O. FISHBACK,
State Insurance Commissioner.
By ————————,
Deputy Commissioner.

APPOINTMENT OF GENERAL AGENT

for

State of Washington.

KNOW ALL MEN BY THESE PRESENTS, That the NATIONAL LIBERTY INSURANCE COMPANY OF AMERICA, a corporation, organized under the laws of the State of New York, and being authorized to, or proposing to be authorized to carry on the business of insurance in the State of Washington, has constituted and appointed, and by these presents does constitute and appoint Lamping & Company, Inc., whose street address is Colman Building, of Seattle, State of Washington, its General Agent and/or Manager for the State of Washington. Giving and granting unto the said LAMPING & COMPANY, Inc., the powers to act as General Agent and/or Manager for said company, and in its name, place and stead, to receive on behalf of said company, from the Insurance Commissioner of the State of Washington, any and all copies of process served upon such Insurance Commissioner in proceedings or actions brought against said company in the State of Washington, and in its name to file and/or adopt rates

as required by the laws of the State of Washington, and to do and perform all acts in the execution and prosecution of the business of said National Liberty Insurance Company, in the State of Washington, in as full and ample a manner as the said Company might itself do.

IN WITNESS WHEREOF, The NATIONAL LIBERTY INSURANCE COMPANY OF AMERICA, by resolution of its Board of Directors, duly made and passed at a regularly called meeting thereof, and/or as provided by its by-laws, has caused these presents to be subscribed and its corporate name and seal to be affixed hereto, this 24 day of March, 1924.

NATIONAL LIBERTY INS. COMPANY OF AMERICA.

By GUSTAV KEHR,
President.

Attest: LOUIS PFINGSTAG,
Secretary.

[Corporate Seal]

"National Liberty Insurance Company of America."

25¢ Revenue Stamp. Canceled.

A fee of $1.00 is required for filing this document. Attach and cancel 25¢ Revenue Stamp.

Filed in the Office of the Insurance Commissioner of the State of Washington, Sept. 19, 1924, at —— o'clock, ——M. H. O. Fishback, Commissioner. By H.

No. 4681. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 31, 1925. F. D. Monckton, Clerk.

PLAINTIFF'S EXHIBIT No. 4.

8952. Plffs. Exhibit 4. Admitted.

No. 1189.

STATE OF WASHINGTON,

Department of Insurance.

Olympia.

I, H. O. FISHBACK, State Insurance Commissioner, do hereby certify that I am the state official charged with the general control and supervision of all insurance business (except State Workmen's Compensation) transacted in the State of Washington and charged with the administration of the laws relating to insurance in said jurisdiction, and that this office is a department of record, having the custody of original documents.

I FURTHER CERTIFY, That the within and annexed document is a full, true and correct copy of the list of applications for renewal of agent's licenses dated March 21, 1924, of the NATIONAL LIBERTY FIRE INSURANCE COMPANY, (Washington Underwriters) of New York, New York, as the same appears on file with this Department.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of the In-

surance Department of the State of Washington, this 21st day of January, 1925.

[Seal] H. O. FISHBACK,
State Insurance Commissioner.
By ————————,
Deputy Commissioner,

State Form No. [illegible] Approved by [illegible]

Application for Renewal of Agents' Licenses

DO NOT use this blank except in making application for the renewal of licenses which are now in force. Do not include any names of persons applying for new licenses but use the smaller blank for such purpose. All agents' licenses expire on the 31st day of March of each year unless sooner revoked.

To the Insurance Commissioner of the State of Washington:

Dated Mar. 21, 1924.

This application is made for the purpose of procuring Renewal Certificates authorizing the persons named in the following schedule to act as agents for (Washington Underwriters) National Liberty Fire Insurance *Company in the State of Washington for the year ending March 31, 192. 5*

They were all duly licensed during 19 under the Insurance Laws of the State of Washington, and we request that Renewal licenses be granted.

(Washington Underwriters)
National Liberty Fire Insurance Company *Company*

Date Filed

Date Issued ISSUED APR 12 1924

Number of Agents 23

By Lamping & Co. Gen. Agts.

This appointment must be signed either by officers of the Company, or by the manager or agent having authority on record with the Commissioner. The name of each and every individual member comprising a firm, and the names of the executive officers of a corporation, must be given.

Do not write in this column	Name of Agent (Individual, Firm or Corporation) Allow double space between agencies	Individual Names of Members of Firm and Executive Officers of Corporation	PLACE OF RESIDENCE	COUNTY
10166	... C.Murray 7-8-24		Aberdeen	Grays Harbor
10167	Edmond C. Prudhom		Burlington	Skagit
10168	Bacon & Elle	J. H. Bacon & H. H. Elle	Bellingham	Whatcom
10169	L. S. Bowers		Chehalis	Lewis
10170	James W. Dow		Chewelah	Stevens
10171	Halvor Quam		Everett	Snohomish
10172	S.S.Nesbit		Ellensburg	Kittitas
10173	S. G.Leach		Garfield	Whitman
10174	Hinton Finance Company	J. A.Hinton	Hoquiam	Grays Harbor
10175	Edward R.Voorhies		Morton	Lewis
10176	Frank C. Johnson		Mount Vernon	Skagit
10177	H. J. Erickson		Port Angeles	Clallam
10178	Curt J. Murphy		Snohomish Arlington	Snohomish
10179	Hahn & Kent Jul 22-24	I. Lloyd Hahn H. O. Kent Jul 22-24	Spokane	Spokane
10180	Washington Trust Company	J. H. Stanton, Fred J. Blomberg Fred L. Stanton, O. M. Anderson M. B. Connelly, F. J. Guee	Spokane	Spokane
10181	Marion K. Morton & Co.	M. K. Morton	Tacoma	Pierce
10182	H. W. Arnold		Vancouver	Clarke
10183	William Mackie		Waterville	Douglas
10184	George Retzer		Walla Walla	Walla Walla
10185	John F. Burton		Wenatchee	Chelan
10187	Liberty Savings & Loan Ass'n	F.M. Raymond, Wm. T. Hines W. K. Buck, D.C.Reed	Yakima	Yakima
10188	The Brown-Hart Agency	J. H. Brown-R. Franklin Hart	Olympia	Thurston
10186	Lamping & Company, Inc	Evart Lamping, Mary E T Lamping	Seattle 1	King

No GENERAL AGENT

10,166-10188-23
2
40 23

[illegible] 1205

No. 4681. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 31, 1925. F. D. Monckton, Clerk.

PLAINTIFF'S EXHIBIT No. 5.

8952. Plffs. Exhibit 5. Admitted.

STATE OF WASHINGTON,

Department of Insurance.

Olympia.

I, H. O. FISHBACK, State Insurance Commissioner, do hereby certify that I am the state official charged with the general control and supervision of all insurance business (except State Workmen's Compensation) transacted in the State of Washington and charged with the administration of the laws relating to insurance in said jurisdiction, and that this office is a department of record, having the custody of original documents.

I FURTHER CERTIFY, That the within and annexed document is a full, true and correct copy of the Insurance Agent's License issued by this Department to EDWARD R. VOORHIES of Morton, Washington, on April 15, 1924, to represent the NATIONAL LIBERTY FIRE INSURANCE COMPANY, through the WASHINGTON UNDERWRITERS of New York, for the period ending March 31, 1925, as the same appears on file with this Department.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of the In-

surance Department of the State of Washington, this 21st day of January, 1925.

[Seal] H. O. FISHBACK,
State Insurance Commissioner.
By ————————,
Deputy Commissioner,

STATE OF WASHINGTON—DEPARTMENT OF INSURANCE.

Fee $2.00 No. 18175

INSURANCE AGENT'S LICENSE.

Olympia, April 15, 1924.

This certifies, that EDWARD R. VOORHIES, MORTON, a resident of the State of Washington, and a duly appointed agent of the NATIONAL LIBERTY FIRE INSURANCE CO. (WASH. UNDWS.), NEW YORK, is hereby authorized and licensed to solicit and procure insurance to be written by said company in the classes enumerated in its certificate of authority, within the jurisdiction of the State of Washington and pursuant to the Insurance Code as amended and in force during the continuance of this license. The authority granted hereunder shall continue to March 31st, 1925, unless previously cancelled.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the Insurance Department of the State of Washington.

H. O. FISHBACK,
Insurance Commissioner.
By ————————,
Deputy Commissioner,

(Testimony of James A. O'Neil.)

No. 4681. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 31, 1925. F. D. Monckton, Clerk.

(Witness excused.)

TESTIMONY OF JAMES A. O'NEIL, FOR PLAINTIFF.

JAMES A. O'NEIL, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. SAM A. WRIGHT.)

Q. What is your name, please?

A. James A. O'Neil.

Q. Where do you live? A. In Tacoma.

Q. What is your business?

A. I am vice-president of the Pacific Savings & Loan [26] Association.

Q. How long have you been connected with that Company? A. About six years ago.

Q. And the business of the Pacific Savings & Loan Association is what?

A. A regular Savings & Loan business.

Q. And does that firm make loans on different kinds of property? A. Yes, sir.

Q. Are you familiar with the Morton Hotel, or were you familiar with the Morton Hotel at Morton, Washington, before its destruction by fire?

A. Yes, sir, I appraised it.

Q. State whether or not your company had oc-

(Testimony of James A. O'Neil.)

casion to make a loan on that building and upon that property.

Mr. HULBERT.—I object to that as being wholly incompetent and immaterial.

M. SAM A. WRIGHT.—I am laying the foundation to prove the value of this property.

The COURT.—He may answer "Yes," or "No."

A. Yes.

Q. (Mr. SAM A. WRIGHT.) Did you have occasion to inspect and view and to appraise that property? A. Yes, sir.

Q. When was that?

A. In March, 1924, I think, to the best of my recollection.

Q. As a result of that inspection and appraisement that you made, did you become familiar with the value of that building? A. Yes, sir. [27]

Q. What was the value of that building, Mr. O'Neil, at the time you made the appraisal?

Mr. HULBERT.—I object to that as wholly incompetent and immaterial.

The COURT.—Is there any question raised on that in the pleadings?

Mr. SAM A. WRIGHT.—They deny the loss entirely and the amount of it, and I assume that they question the value.

The COURT.—The objection is overruled.

A. Twenty thousand dollars.

Q. Was that without any improvement?

A. That was without improvements.

Q. Were there any improvements made upon that

(Testimony of James A. O'Neil.)

building as a result of the loan that you made and as a condition of the loan?

A. The condition in making the loan was that $5000 was to be spent on the building.

Q. Was that spent on the building?

A. To the best of my knowledge it was.

Mr. SAM A. WRIGHT.—You may cross-examine.

Mr. HULBERT.—No questions.

(Witness excused.) [28]

TESTIMONY OF W. A. MILLIGAN, IN HIS OWN BEHALF.

W. A. MILLIGAN, plaintiff, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. SAM A. WRIGHT.)

Q. Your name is W. A. Milligan? A. Yes.

Q. You are the plaintiff in this case?

A. Yes, sir.

Q. Where do you live?

A. On 19th Northeast, Seattle.

Q. What is your business at this time?

A. Real estate.

Q. How long have you been in such business?

A. About 9 months.

Q. What was your business prior to that time?

A. The hotel business.

Q. And how long were you in the hotel business?

A. I have been in it about 3 years.

(Testimony of W. A. Milligan.)

Q. And did you formerly own the Morton Hotel property at Morton, Washington? A. I did.

Q. And when did you become the owner of that property?

A. In the latter part of May, 1924.

Q. Did you get a deed of conveyance on it at that time? A. I did.

Mr. SAM A. WRIGHT.—Do you raise any question about the ownership of the property? [29]

Mr. HULBERT.—No, we haven't raised any such question.

Mr. SAM A. WRIGHT.—I understand the plaintiff's ownership of this property is admitted.

Mr. HULBERT.—No. We do not make any claim on that.

The COURT.—Then there is no use to admit documents or facts that are already admitted.

Q. (Mr. SAM A. WRIGHT.) When did you take possession of that property?

A. On May 30, 1924.

Q. Are you acquainted with a man named E. R. Voorhees, at Morton? A. Yes, sir.

Q. When did you meet him?

A. I met him May 30, 1924.

Q. Did you subsequently have any dealings with him? A. I did.

Q. What was his business?

A. Insurance agent.

Q. What company is he agent for?

A. He was—

Mr. HULBERT.—I submit he has not shown

(Testimony of W. A. Milligan.)

himself qualified to testify to what companies Mr. Voorhees represented.

The COURT.—The objection is sustained. You have proof of Mr. Voorhees's agency, as far as that is concerned.

Q. (Mr. SAM A. WRIGHT.) Did you have any business dealings then with Mr. Voorhees after you arived at Morton? [30]

A. Yes, sir.

Q. When was that?

A. I arrived at Morton about 4:30 and one of the first persons that I met there was Mr. Voorhees. He came up and introduced himself to me.

Mr. HULBERT.—I object to that.

The COURT.—Read the question.

(Last question read.)

The COURT.—(Continuing.) Answer briefly when it was.

Q. (Mr. SAM A. WRIGHT.) When was your deal with him in reference to insurance, made?

A. The 31st day of May.

Q. Of last year? A. Yes, sir.

Q. And what was that?

Mr. HULBERT.—I object to that unless it pertains to this transaction.

Mr. SAM A. WRIGHT.—The purpose of this testimony is to show the previous dealings.

The COURT.—He may state briefly, but we do not want all the infinite details. If he procured insurance from him at that time and place, he may answer. The objection is overruled.

(Testimony of W. A. Milligan.)

A. He came in and told me a policy was expiring the next day at noon on the hotel.

The COURT.—You were just asked what business you did with him.

A. I gave him some insurance for $1,200.

Q. (Mr. SAM A. WRIGHT.) Was a policy of insurance subsequently [31] delivered to you on that? A. Yes, sir.

Q. Handing you Plaintiff's Exhibit 7 for Identification, I will ask you to state whether or not that is the policy that— A. Yes, sir.

Mr. HULBERT.—I object to that as having nothing to do with the oral contract of insurance alleged in this case.

The COURT.—It is preliminary. The objection is overruled.

Mr. SAM A. WRIGHT.—I will offer it in evidence.

Mr. HULBERT.—I object to it as being wholly incompetent and immaterial.

The COURT.—On this particular building?

Mr. SAM A. WRIGHT.—Yes.

Mr. HULBERT.—It is not on the building at all.

Mr. SAM A. WRIGHT.—It is on the contents of that building.

The COURT.—The objection is overruled.

PLAINTIFF'S EXHIBIT No. 7.

8952. Plffs. Exhibit 7. Admitted.

No. 50419

STANDARD FIRE INSURANCE POLICY

STOCK COMPANY

WASHINGTON

UNDERWRITERS

By This Policy of Insurance

the

NATIONAL LIBERTY INSURANCE CO. OF AMERICA

Amount $1200.00 Rate 5.00 Premium $60.00

In Consideration of the Stipulations herein named and of

SIXTY and No/100 Dollars Premium,

does insure W. A. MILLIGAN for the term of One Year from the First day of June, 1924, at noon, (Standard Time) to the First day of June, 1925, at noon, (Standard Time) against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding TWELVE HUNDRED and No/100 Dollars, to the following described property while located and contained as described herein, and not elsewhere, to wit:

Standard Forms Bureau Form 291

HOTEL, APARTMENT, BOARDING AND LODGING HOUSE FORM

(BUILDING AND FURNITURE AND FIXTURES)

On the following described property, all situate facing east on Second Street, MORTON, WASHINGTON.

(Fire Map Block 13, Nos. 37–38–39)

$Nil On the XX story XX roof XX building, and its additions (if any) of like construction communicating and in contact therewith, including foundations, sidewalks, plumbing, electrical wiring and stationary heating and lighting apparatus and fixtures; also all permanent fixtures, awnings, wall and ceiling decorations and frescoes, stationary scales and elevators, belonging to and constituting a part of said building, only while occupied for Hotel purposes.

*2. $1200.00 On hotel or apartment or boarding or lodging house furniture, fixtures and furnishing material, useful and ornamental; musical instruments; mirrors, pictures, paintings, engravings and their frames; silver and plated ware, crockery, glassware and cutlery; supplies, provisions and fuel; laundry machinery and ap-

paratus, electrical apparatus, appliances and devices; tools, implements and utensils used in the business, and signs; and (provided the insured shall be liable by law for loss or damage thereto or shall have specifically assumed liability therefor), this insurance shall also cover the personal property of guests held in custody by the insured; all only while contained in the above described building and its additions (if any) of like construction communicating and in contact therewith.

*3. $Nil On .....

.....

*4. $Nil On .....

.....

*No insurance attaches under any of the above items unless a certain amount is specified and inserted in the blank immediately preceding the item.

"Limitation on Amount Recoverable on One Article." Claim for loss on any one picture, piece of statuary, curiosity, or work of art, shall not exceed two hundred and fifty ($250) dollars unless specifically insured.

Loss or damage for which insured shall be liable by law, or for which insured shall have specifically assumed liability, under item 2 above, shall be adjusted with and payable to the insured named in this policy.

"Restriction in Case of Specific Insurance." No

article or piece of personal property separately insured for a specific amount under this, or any other policy, is covered by this policy except for such specific amount, if any, named herein; nor shall this company be liable for loss to property of others for which the insured is liable by law or shall have specifically assumed liability, on which insurance is carried by or in the name of others than the insured named in this policy.

"Sidewalk Clause." It is understood that property above described is also covered under its respective items, on sidewalks, platforms and alleyways pertaining to above described building, only while in daily transit to and from said building.

Other insurance permitted.

Loss, if any, subject however to all the terms and conditions of this policy, payable to S. J. BERGEN, as his interest may appear.

The provisions printed on the back of this form are hereby referred to and made a part hereof.

Attached to Policy No. 50419 of the Washington Underwriters of the National Liberty Insurance Co. of America.

Agency at Morton, Washington. Dated June 1, 1924.

E. R. VOORHIES,
Agent.

Trade Mark
Standard
291
July 1917

Insurance Map
Sheet .....
Block .....
No. .....

For Other Provisions See Reverse Side of This Rider

Provisions Referred to in and Made part of this Rider (No. 291)

"Permits." Permission granted to make alteration or repairs to the above described building without limit of time, and to build additions, and if of like construction and communicating and in contact therewith, this policy shall cover on or in same under its respective items pertaining thereto; permission also granted to do such work in said building as the nature of the occupancy may require; to work at any and all times; and, when not in violation of law or ordinance, to generate illuminating gas or vapor, and to keep and use the necessary quantities of all articles, things and materials incidental to the business conducted therein and for the operation of said building, it being warranted by insured that no artificial light (other than incandescent electric light) be permitted in the room when the reservoir of any machine or device using petroleum or any of its products of greater inflammability than kerosene oil is being filled or drawn on. A breach of this warranty suspends this insurance during such breach. But notwithstanding anything herein contained, the use, keeping, allowing, or storing on the within described premises of dyna-

mite, fireworks, Greek fire, gunpowder in excess of fifty pounds, nitro glycerine or other explosives is prohibited and shall wholly suspend this policy during the period such use, keeping, allowing or storing shall continue unless a specific permit therefor is attached to this policy.

"Lightning Clause." This policy shall cover any direct loss or damage by lightning (meaning thereby the commonly accepted use of the term "lightning" and in no case to include loss or damage by cyclone, tornado or windstorm) not exceeding the sum insured nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy; Provided, however, that if there shall be any other insurance on said property this company shall be liable only pro rata with such other insurance for any direct loss by lightning whether such other insurance be against direct loss by lightning or not.

"Electrical Exemption Clause." If dynamos, wiring, lamps, motors, switches or other electrical appliances or devices are insured by this policy, this insurance shall not cover any immediate loss or damage to dynamos, exciters, lamps, motors, switches, or any other apparatus for generating, utilizing, testing, regulating, or distributing electricity, caused directly by electric currents therein whether artifical or natural.

This Policy is made and accepted subject to the foregoing stipulations and conditions, and to the following stipulations and conditions printed on back hereof, which are hereby specially referred to

and made a part of this Policy, together with such other provisions, agreements, or conditions as may be endorsed thereon or added hereto; and no officer, agent or other representative of this Company shall have power to waive any provision or condition of this Policy except such as by the terms of this Policy may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the insured unless so written or attached.

Provisions required by law to be stated in this policy.—This policy is in a stock corporation.

IN WITNESS WHEREOF, this Company has executed and attested these presents; but this policy shall not be valid until countersigned by the duly authorized Agent of the Company at Morton, Washington.

CHARLES H. COATIS,
President.
E. R. VOORHIES,
Agent.
WM. G. ARMSTRONG,
Secretary.

Countersigned at Morton, Washington, this 3d day of June, 1924.

This company shall not be liable beyond the actual cash value of the property at the time any

loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper reduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to

this insurance or the subject thereof, whether before or after a loss.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if machanics be employed in building, altering or replacing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if

illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom or trade or manufacture to the contrary notwithstanding) there be kept, used or allowed on the above described premises, benzine, bensole, dynamite, ether, fireworks, gasoline, Greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitroglycerine, or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law, but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten fet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority, or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the

result of fire, all insurance by this policy on such building or it contents shall immediately cease.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company.

This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the *pro rata* premium.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not, in any case of

removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certi-

ficate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be specifically agreed hereon.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

No suit or action on this policy, for the recovery

of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

[Endorsed]: Standard Fire Insurance Policy. Stock Company. No. 50419. Washingtdn Underwriters, New York. Policy of National Liberty Insurance Co. of America Head Office 709 6th Ave., New York, N. Y. Assured: W. A. Milligan, Morton, Washington, Date June 1, 1924. Expires June 1, 1925. Amount—$1200.00. Premium—$60.00. Rate—5.00. Property—Furniture and Fixtures. E. R. Voorhies, Agent.

[Endorsed]: No. 4681. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 31, 1925. F. D. Monckton, Clerk.

(Testimony of W. A. Milligan.)

Q. (Mr. SAM A. WRIGHT.) When was that policy delivered to you, Mr. Milligan?

A. It was about the 6th or 7th of June that he brought it over to me.

Q. Did he prepair any other insurance for you at that time? A. He did.

Q. How much? A. $2,000.

Q. In what company?

A. The Washington Underwriters, the National Liberty [32] Insurance Company?

Q. In this same company? A. Yes, sir.

Q. What was done about that insurance?

A. It was cancelled.

Q. With whom did you agree as to the amount of premium in this policy?

A. With Mr. Voorhees.

Mr. HULBERT.—I object to that. The evidence does not show that he agreed with anybody.

The COURT.—The objection is overruled.

Q. (Mr. SAM A. WRIGHT.) Did you have any dealings with any other representatives of this company in reference to insurance, whatever?

A. I did not.

Q. Now, Mr. Milligan, subsequent to that date did you have any dealings with Mr. Voorhees?

A. Yes.

Q. On what date did you have those dealings with Mr. Voorhees?

A. On Tuesday, July 22, 1924.

Q. And tell the jury what those dealings were.

(Testimony of W. A. Milligan.)

A. I called at Mr. Voorhees' office and I said, "I guess it is about time for me to—"

Mr. HULBERT.—I object to the conversation.

The COURT.—The objection is overruled.

A. (Continuing.) "—to see about some insurance," and Mr. Voorhees said, "It is about time, my brother, it is just about time." He had been after me before, right along, for insurance. He said, "I will be over this evening and [33] inspect your place, and we will fix it up."

Q. (Mr. SAM A. WRIGHT.) Did he come over that evening? A. He did.

Q. Tell the jury what took place on his arrival that evening.

A. About 7:30 or 8 o'clock Mr. Voorhees came over and I was in the lobby of the hotel, and he said, "I came in to fix up that insurance, and I want to go around to see what shape the building is in," and I said, "Do you want me to go with you, or will you go alone?" And he said, "I will go alone; I know this hotel as well as you do." And he went upstairs and was gone a few minutes, and came in and went out back, and then he said to me, "Mr. Milligan, you ought to have twice as much as you have now," and I said, "Maybe so; but I cannot afford it; it will cost too much money." And he said, "You haven't a great deal of insurance because the loan company has—"

Mr. HULBERT.—I object to this.

The COURT.—There is no need of going over all the infinite details, but he may proceed briefly.

(Testimony of W. A. Milligan.)

A. (Continuing.) "—And there was $1,200 Mr. Bergon has, and you haven't hardly anything," and I said, "$10,000 would be all I can handle," and he said, "All right, we will make it $10,000." And he takes out his pencil and paper and asked what my initials were and I told him W. A., and he said, "How do you want to place it, all on the building?" And I said, "$6,000 on the building, and $4,000 on the furnishings and equipment; you know I own the building and the barber-shop and the pool-room and the cafe," and he said, "Yes, I know that [34] well," and he said, "We will make it $10,000," and I said "How much will it cost me?" and he said "$500," and I said, "Can't you make it less than that?" and he said, "No, it is a straight 5% for one year," and I asked if he would not give me 3 years for the price of two, and he said, "No, I cannot vary 5 cents from that rate," and he said, "You can have 60 days to pay this premium," and, "I will have a check for you in 60 days," I said. "I may not need the 60 days," I said, and I said, "What company are you placing this in?" And he said, "In the Washington Underwriters," and I said, "Is that a good company, is that a local company?" And he said, "Oh, yes, that is just the name of the policy, the Underwriters, it is the National Liberty Insurance Company of New York, one of the strongest in the world," and I said, "All right," and he put this in his pocket, and I said, "When will this take effect?" and he said, "Right now; you are insured right

(Testimony of W. A. Milligan.)

now; I will date it at 12 o'clock noon to-day, and if your building burns down tonight you will get every dollar of your insurance." He said, "I will go over to the office and fix up the policy and deliver it to you to-morrow."

Q. Was there anybody present during that conversation, Mr. Milligan?

A. Yes, sir, Mr. Bert Bagley.

Q. Did he make any reference, when you asked about this insurance company, to the other policy?

A. Yes, sir. He said, "It is just the same company as the little policy, the same company as the original Steve Bergon policy." [35]

Q. Had he distributed any literature around your hotel advertising this company?

A. Yes, sir, that is one of the things he called attention to when I arrived that he had placed desk pads and blotters around.

Mr. HULBERT.—I object to that as immaterial.

The COURT.—Rather so, but it simply shows—

Mr. SAM A. WRIGHT.—It shows the way this man was held out as the agent.

The COURT.—It might be a circumstance corroborative of the other testimony of the witness.

Q. (Mr. SAM A. WRIGHT.) Who collected the premium on this first policy? A. Mr. Voorhees.

Q. When did you next see Mr. Voorhees about this matter that had taken place on July 22d?

A. Next morning.

Q. What took place at that time?

A. Mr. Voorhees came in the office and he said,

(Testimony of W. A. Milligan.)

"I fixed up a memorandum on that insurance, but I found I was out of that particular form, and I asked them down to Seattle, and it will be in the mail and I will get it next day," but he said, "Do not let it bother you. You are covered from yesterday at noon, the same as if you had the policy in your hand."

Q. Was there any memorandum that he had prepared exhibited to you at that time?

A. He had a little memorandum where he had the name of the insured on it and the amount and the company.

Mr. SAM A. WRIGHT.—If your Honor please, I have [36] served notice on the defendant to produce that memorandum, and I will now ask them to produce it.

Mr. HULBERT.—We never had any such memorandum. You can put Mr. Voorhees on the stand and ask him about it if you wish.

The COURT.—That is sufficient. Proceed.

Q. (Mr. SAM A. WRIGHT.) Just tell the jury, Mr. Milligan, what that memorandum was, as you recall it.

A. Well, the name of the insured was my name, W. A. Milligan, Morton, Washington, and $6,000 on the Morton Hotel building, and $4,000 on the furnishings and equipment, and it was dated from July 22, 1924, at 12 noon, in the Washington Underwriters, National Liberty Insurance Company, and signed by E. R. Voorhees, agent.

(Testimony of W. A. Milligan.)

Q. When did you next have a conversation with Mr. Voorhees about this matter?

A. Friday evening.

Q. On what date? A. July 5, 1924.

Q. What was that conversation?

A. I said, "Mr. Voorhees, have you got that policy for me? I am going to Seattle to-morrow, and I want to take it down and put it in my safety deposit vault. I do not like to keep that stuff around here. I like to keep it all together," and he said, "By golly, that hasn't come yet." He said, "You know how our mails are from Seattle, and it hasn't arrived, and possibly it is in the post office now, and you will not be leaving until noon," and I said, "No," and he said, "If it is in the mail I will fill it out, fill out the details in [37] it, and deliver it to you in the morning," and he said, "Do not let it bother you; you are covered from Tuesday noon."

Q. Was anybody present on that occasion that you remember of? A. Yes, sir.

Q. Who was present? A. Mr. Fletcher.

Q. What happened that night?

A. That was the night of the fire.

Q. Did the fire take place that night?

A. Yes, sir.

Q. About what time? A. Between 1 and 1:30.

Q. And what happened as a result of that fire?

A. The hotel was totally destroyed.

Q. Were all the contents likewise destroyed?

A. Yes, sir.

(Testimony of W. A. Milligan.)

Q. During the time this fire was in progress did you meet and have a conversation with Mr. Voorhees? A. I did.

Q. What was that conversation?

A. I met Mr. Voorhees and I said, "I guess I was pretty lucky getting that insurance," and he said, "I will say you was, I will say you was."

Q. And did you have a conversation later on that same morning with him?

A. Yes, sir; next morning.

Mr. HULBERT.—I object to that as incompetent; what was said afterwards by an agent cannot bind [38] his principal.

The COURT.—I think so. The objection is sustained.

Mr. SAM A. WRIGHT.—I think that is correct. I will withdraw the question.

Q. (Mr. SAM A. WRIGHT.) Where did you go after the fire? A. I came down to Seattle.

Q. And where did you go upon your arrival at Seattle?

A. When I arrived I went to Lamping & Company's office.

Q. How did you happen to go there?

A. Mr. Voorhees told me he had sent a wire to Lamping & Company.

Mr. HULBERT.—We object to that.

The COURT.—He may answer; the objection is overruled.

Q. (Mr. SAM A. WRIGHT.) Will you state at

(Testimony of W. A. Milligan.)

whose request you went to Lamping & Company's office? A. Mr. Voorhees'.

Q. For what purpose?

A. To see about an adjuster.

Q. What took place when you arrived at the office of Lamping & Company?

A. It was later Saturday afternoon and the office was closed.

Q. When did you visit them again?

A. Monday morning about 10:30.

Q. What happened?

A. I went to the office and the young lady came to the desk and I told her I was Mr. Milligan of Morton, Washington, of the Morton Hotel, and she said, "Oh, yes; you had better see Mr. Lamping," and Mr. Lamping came up and I [39] told him I was Mr. Milligan of the Morton Hotel, and he said, "Oh, yes, we received a wire from Mr. Voorhees."

Mr. HULBERT.—I object to that.

The COURT.—What is the object of this?

Mr. SAM A. WRIGHT.—As showing the agent Voorhees had sent for an adjuster to adjust this loss.

The COURT.—Is that the only purpose of it?

Mr. SAM A. WRIGHT.—That is the purpose of it.

Mr. HULBERT.—That is wholly incompetent.

Mr. SAM A. WRIGHT.—As showing the understanding of the agent, the understanding the agent had that he had insured this property and that he

(Testimony of W. A. Milligan.)

had requested an adjuster in this company to adjust the loss.

The COURT.—As far as it shows an attempt to comply with the terms of the policy to adjust it, he may proceed.

Mr. SAM A. WRIGHT.—That is the additional purpose of it, and also it was notice of the loss.

The COURT.—You may make that showing if they knew it.

Q. (Mr. SAM A. WRIGHT.) Just what happened when you met Mr. Lamping?

A. He said, "Oh, yes,—"

The COURT.—Not about a telegram he received. If you made a request for an adjuster you may state it.

Q. (Mr. SAM A. WRIGHT.) Did you request an adjuster of Mr. Lamping at that time?

A. No, sir. [40]

The COURT.—I think you may proceed to show that Mr. Lamping had said he would send an adjuster or anything of that sort.

Q. (Mr. SAM A. WRIGHT.) What was said by Mr. Lamping as to whether an adjuster would be sent out? A. Nothing.

Mr. SAM A. WRIGHT.—Mr. Hulbert, I have served a notice to produce, upon you, some proofs of loss submitted. Have you them? We have a copy here.

Mr. HULBERT.—We do not make any question about that. I think the proof of loss was filed.

(Testimony of W. A. Milligan.)

Mr. ELIAS A. WRIGHT.—You admit the proof of loss was filed and received?

The COURT.—Proceed with your copy if you have it.

Q. (Mr. SAM A. WRIGHT.) Did you proceed to prepare a proof of loss in this matter?

A. Yes, sir.

Q. Is that the proof of loss you caused to be delivered to this defendant company? (Handing to witness.) A. Yes, sir.

Mr. SAM A. WRIGHT.—I will offer it in evidence.

The COURT.—It may be admitted.

(Proof of loss admitted in evidence as Plaintiff's Exhibit 8.)

PLAINTIFF'S EXHIBIT No. 8.

8952. Plffs. Exhibit 8. Admitted.

To The National Liberty Insurance Company of America, 709–6th Avenue, New York City, New York,

and

To Lamping & Company, Inc., its General Agents Colman Building, Seattle, Washington.

On July 22, 1924, your agent, E. R. Voorhies, in Morton, Washington, accepted from me ten thousand dollars ($10,000.00) insurance in your Company on my hotel at Morton, Washington. The insurance was divided as follows: six thousand dollars ($6000.00) on the building and four thousand dollars ($4000.00) on the hotel, or apartment, or

boarding or lodging house furniture, fixtures, furnishings, building materials, etc. and the restaurant furniture, fixtures, and equipment, the pool hall furniture, fixtures, and equipment, and the barber shop furniture and equipment; all of which was situated in my hotel building, in Morton, Washington, which is described as "facing East on Second Street, Morton, Washington, Fire Map thirteen (13) numbers 37–38–39."

Mr. Voorhies, had previously, as agent for your Company accepted and written your policy Number 50419 on some of this property, and on the date specified, to wit: July 22, 1924, after making a detailed examination of the entire property accepted in your behalf the additional insurance in the amount indicated above; and on the evening of July 23d assured me in the presence of witnesses that I was covered in your Company, and on the evening of July 25, 1924, when I asked if the policy were yet ready for delivery he again assured me that I was covered, and had been covered since July 22, 1924 and that the insurance was effective as of that date; and that my premium would be figured from July 22, 1924 to July 22, 1925, and informed me of the amount of the premium which was the sum of five hundred dollars ($500.00); and which said premium I was to have sixty (60) days in which to pay, and which premium in the amount specified, I have heretofore tendered to him. Under the circumstances it is my contention that your Company insured me against loss and damage by fire, as to the items hereinbefore specified to the amount of ten thousand dollars

($10,000.00) over and above the other policy of insurance referred to as your Policy Number 50419, and referred to above.

You are further notified that in addition to the amount of insurance in your Company there was fire insurance upon the building only to the extent of fifteen thousand dollars ($15,000.00) which policies are in the possession of the Pacific Savings and Loan Association of Tacoma, Washington; but the names of the Companies, in which this insurance was placed, and the amount thereof, is not now known to me, as that Company as the mortgagee of the real property has possession of the policies of insurance, and handling the matter of adjustment as it has twelve thousand dollars ($12,000.00) upon the real property.

You are again notified, although I have previously notified you that a fire occurred on the morning of Saturday, July 26th, 1924 about 1:15 A. M., and as a result thereof, the property insured, both building, and personalty were totally destroyed by fire. The origin and cause of the fire is unknown, but it is supposed to have originated in one of the sleeping rooms on the first floor of the hotel property, where the son and daughter of the proprietress of the restaurant were sleeping.

You are further notified that the actual value of the building destroyed was at least the sum of twenty-five thousand dollars ($25,000.00) at the time of the fire loss, and that the actual value of the personal property destroyed by fire will exceed, and did exceed ten thousand dollars ($10,000,00).

An inventory of the various items of personal property segregated as to its location, is attached hereto, and the insured claims of your Company by reason of said loss, damage, and insurance, exclusive of your policy Number 50419, the sum of ten thousand dollars, in full of its proportion of said loss.

You are further notified that the insured, the undersigned, stands ready and willing to furnish any other additional proof of the placing of said insurance, the extent or value of the said property, as your Company may wish or desire.

You are further notified that the property belonged to the undersigned, and that there was a mortgage on the real property in favor of the Pacific Savings and Loan Association, of a balance in the sum of twelve thousand dollars, and a small amount of interest; and that there was a Chattel Mortgage on the personalty in favor of S. J. Bergen of Morton, Washington, in the sum of twelve hundred dollars.

You are further notified that the said fire did not originate by any act, design, or procurement on the part of the assured, nor on the part of any one having any interest in the property insured, or in the insurance, nor in consequence of any fraud, or evil practice, done or suffered by the said assured; that nothing has been done by or with the privity or consent of the assured in connection with the said fire loss, or to increase the fire hazard; and that any other information that may be required by your Company as aforesaid, will be furnished on call, and considered a portion of this proof.

IN WITNESS WHEREOF, I have caused this proof of loss to be executed this 5th day of August, 1924.

W. C. MILLIGAN.

State of Washington,
County of King,—

W. A. Milligan, being first duly sworn on his oath deposes and says: That he is the person who has signed the above and foregoing Proof of Loss, that he has read same, is familiar therewith, and swears, that same is true, and that no material fact known to him, is withheld, that the Insurance Company, other than is stated in the above manner or matter whatsoever, but that if there is any additional information desired by the Insurance Company, other than is stated in the above and foregoing Proof of Loss, he will gladly furnish same.

[Seal] W. A. MILLIGAN.

Subscribed and sworn to before me this 5th day of August, 1924.

SAM A. WRIGHT.

Subscribed and sworn to before me this —— day of August, 1924.

Sixteen Rooms.

16 beds	$432.00
springs	240.00
mattresses	380.00
blankets	128.00
32 sheets	56.00

16	bed spreads	52.00
32	pillow slips	32.00
32	quilts	112.00
16	plain chairs	64.00
16	rocking chairs	144.00
16	tables	204.00
16	dressers	480.00
32	table runners	16.00
48	towels	9.60
16	pitchers	11.20
16	slop jars	20.00
16	glass holders	5.60
16	water glasses	1.60
32	curtains	28.00
32	drapes	48.00
16	rugs	336.00
32	clothes racks	24.00
16	pair pillows	143.20
16	cuspidors	9.60

Twenty-four rooms.

24	beds	$450.00
	springs	288.00
	mattresses	450.00
	blankets	96.00
	sheets	84.00
24	bed spreads	78.00
72	pillow slips	72.00
48	quilts	168.00
48	plain chairs	168.00
24	tables	192.00
24	dressers	450.00

72	towels	14.40
24	pitchers	16.80
24	slop jars	30.00
24	water glasses	2.40
48	curtains	42.00
24	rugs	288.00
48	clothes racks	36.00

Store room.

3	rag rugs	$16.00
7	quilts	24.50
18	pictures	108.00
	carpet sweeper	5.00
	dust mop	1.25
3	curtain rods	.45
2	steel cots	7.50
2	hand sprayers	1.50
	broom	.50
11	clothes racks	5.50
	vacuum cleaner & hose	25.00
	box palm olive soap	8.00
53	pillow slips	53.00
2	small rugs	3.00
	laundry basket	1.50
56	hand towels	11.20
67	sheets	117.25
36	bath towels	10.80
5	pairs curtains	8.75
7	table covers	7.00
12	slop jars	15.00
3	pans	2.25

Lobby.

3 oil paintings	$150.00
1 clock	15.00
1 safe	150.00
desk	125.00
key rack	15.00
7 chairs	42.00
2 rockers	25.50
1 table	18.75
1 long table	35.00
2 mats	10.00
6 high shades	12.00

Locker Room.

2 floor brushes	$3.00
window brush	1.50
oil mop	1.25
fire extinguisher	25.00
4 cuspidors	4.00

Banquet Hall.

4 long tables	$60.00
1 steel cot	3.75
8 chairs	32.00
baby bed and springs	10.00
1 quilt	3.50
1 blanket	4.50
couch cover	2.75
mattress	4.75

Gents' Bath room.

1 chair	$3.50
1 small rug	1.50
2 bath towels	.60
2 hand towels	.40
soap dish	.25
cuspidor	1.00
paper rack	1.25

Ladies' Bath Room.

1 chair	$3.50
1 small rug	1.50
2 bath towels	.60
2 hand towels	.40
soap dish	.25
cuspidor	1.00
paper rack	1.25

Halls.

hall carpet	$825.00
8 curtains	14.00
4 pair drapes	12.00

Laundry room.

8 lamps	$4.00
ice box	25.00
1 range	25.00
15 pictures	45.00
wash tub, fruit jars and 2 lanterns	5.00

Wash room upstairs.

1 large mirror	$10.00

4	towels	.80
2	chairs	7.00

Restaurant—

Dining room.

9	sets knives and forks	$45.00
26	big spoons	19.50
4	sets tea spoons	12.00
	childs knife and fork	1.00
3	covered glass dishes and extra cover	4.50
1	glass cake stand	1.50
7	candy trays	7.00
5	glass sauces	.75
8	tables	96.00
8	chairs	32.00
3	child's high chair	9.00
2	stools	3.00
9	swivel chairs	58.50
1	show case	25.00
	wall case and back bar mirror	1000.00
39	salt and pepper	3.90
4	tooth pick holders	.40
12	sugar bowls	2.40
2	mustard jars	.30
1	vinegar cruet	.20
6	tea pots	1.80
6	napkin holders	1.50
19	lamp shades	14.25
8	syrup jugs	2.00
1	glass cream pitcher	.15
32	soup bowls	3.20
11	mush bowls	1.10

14	sauce dishes	.70
30	pie plates	4.50
30	creamers	3.00
16	butter chips	1.60
3	whippers	1.05
1	toaster	.35
1	large grater	.35
1	thermometer	2.50
2	large iron forks	1.00
1	egg beater	.50
2	biscuit cutters	.30
1	measuring set spoons	.25
3	funnels	.75
5	soup ladles	1.25
5	strainer ladles	1.75
4	wooden spoons	1.00
2	cake turners	.50
1	iron spoon	.50
1	beater	.50
1	china cup	.10
1	tea strainer	.25
1	can opener	.25
2	funnels with handle	1.00
6	gem pans	1.50
2	cake tins (square)	.30
8	cake tins (round)	1.20
17	pie tins	2.55
3	cake pans	.45
1	chopping board	.15
8	square cake pans	2.40
2	large coffee pots	6.00
2	small coffee pots	3.00

1	gallon oil can	.75
28	coffee cups	4.20
19	vegetable dishes	5.70
22	side dishes	3.30
26	large platters	9.10
29	small platters	7.25
21	large plates	4.20
5	soup dishes	.75
2	lunch counters	6.00
	kitchen steamtable	75.00
8	kettles and covers	16.00
2	platters and covers	1.00
2	candy jars	1.00
1	glass cake box	.30
15	water glasses	.75
1	bell	.35
1	Lang range and hood	550.00
11	stone jars	5.50
1	tea pot	.35
1	chafing dish frame	1.00
1	meat grinder	2.30
1	coffee grinder	1.25
1	sieve	.50
1	bread board	.50
1	marble slab	12.00
1	cookie jar	.50
3	enameled ware pitchers	.90
1	white pitcher	.30
2	wire potato mashers	.50
1	wood potato masher	.25
4	large pans	6.00

1	copper kettle (bailes reserved)	3.00
2	chocolate stew kettles (bailes reserved)	3.00
1	sieve	.25
1	pint measure	.15
3	collenders	.75
2	sieves	.50
1	tea kettle	3.00
3	fry pans (large)	6.00
7	fry pans (small)	7.00
12	bread pans (large)	4.20
1	roasting pan (oval)	3.00
1	roasting pan (square)	3.00
16	pot covers	2.40
2	large kettles (fawcets)	12.00
1	small kettle (fawcets)	3.00
1	steamer and cover	1.50
1	round bottom kettle (iron)	3.00
1	iron donut kettle	3.00
2	wire nets	1.00
2	small kettles and covers	.70
1	sixty gal. tank & stand	25.00

Barber Shop.

1	barber chair	$125.00
2	settees	30.00
1	back case and mirror for 3 chairs	250.00
1	glass cupboard	75.00

(Testimony of W. A. Milligan.)

Pool Room.

2 pool tables	$300.00
1 bar and back bar	1250.00
1 refrigerator and show case combination	200.00
One pipe display case	35.00
1 top case	25.00
2 glass display wall cases	750.00
1 cash register #860014	650.00

New Stuff.

6 rugs	$126.00
2 dozen sheets	47.00
2 dozen hand towels	4.40
1 dozen bed spreads	39.00

Grand Total $14,177.40

[Endorsed]: No. 4681. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 31, 1925. F. D. Monckton, Clerk.

Q. (Mr. SAM A. WRIGHT.) State whether or not you subsequently paid the premium—

The COURT.—Is it necessary to show the time it was prepared and served? [41]

Q. (Mr. SAM A. WRIGHT.) Do you know how long after the fire your proof of loss was prepared and delivered to the defendant company?

A. Just a few days.

Mr. SAM A. WRIGHT.—I think it is dated, if Your Honor please.

(Testimony of W. A. Milligan.)

The COURT.—Very well.

Q. (Mr. SAM A. WRIGHT.) Did you subsequently pay the premium upon this insurance?

A. I did.

Q. To whom did you pay it?

A. To Mr. Voorhees.

Q. Is that the certified check with which you paid it? (Handing to witness.) A. It is.

Q. That was delivered to Mr. Voorhees?

A. Yes, sir.

Mr. HULBERT.—You do not claim you paid it, but that you tendered it.

Mr. SAM A. WRIGHT.—We claim it was sent to Mr. Voorhees and received by him.

Mr. HULBERT.—And returned.

Mr. SAM A. WRIGHT.—Yes.

Q. (Mr. SAM A. WRIGHT.) How long was this check retained by Mr. Voorhees?

A. Over 60 days.

Q. And it was subsequently returned to you?

A. Yes, sir.

Mr. SAM A. WRIGHT.—We will offer this in evidence, and also as a tender and the keeping [42] of the tender of the premium good on this insurance.

Mr. HULBERT.—Have you the letters that accompanied it?

Mr. SAM A. WRIGHT.—Yes.

Mr. HULBERT.—Will you let me have it please?

Mr. SAM A. WRIGHT.—I have also served notice on you too, a notice to produce a letter which accompanied that check. Have you that letter?

(Testimony of W. A. Milligan.)

Mr. HULBERT.—I do not think we have, but I will admit the letter was sent.

The COURT.—You may use the copy.

(Check was marked Plaintiff's Exhibit 9 and admitted in evidence.)

PLAINTIFF'S EXHIBIT No. 9.

8952. Plffs. Exhibit 9. Admitted.

Seattle, Washington, Aug. 4, 1924.

No. 299.

19-3-12

THE NATIONAL BANK OF COMMERCE

Pay to the order of C. R. Voorhies $500.00 Five Hundred Dollars.

W. A. MILLIGAN.

[Stamped across face:] No. 66620. Certified Aug. 4, 1924. The National Bank of Commerce of Seattle. F. W. Smith, Cashier. Certified Check.

[Endorsed]: No. 4681. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 31, 1925. F. D. Monckton, Clerk.

Q. (Mr. SAM A. WRIGHT.) Is that the letter to Mr. Voorhees, or a copy of the letter, which accompanied the check?

A. Yes, sir.

Mr. SAM A. WRIGHT.—I will offer that in evidence if the Court please.

(Said letter was then marked Plaintiff's Exhibit 10.)

PLAINTIFF'S EXHIBIT No. 10.

8952. Plffs. Exhibit 10. Admitted.

August 4, 1924.

Mr. E. R. Voorhies,
Agent of the National Liberty Insurance Company of America, Morton, Washington.

Dear Sir:

You will find enclosed herein a check in the sum of five hundred dollars ($500.00) tendered on behalf of W. A. Milligan for the additional ten thousand dollars ($10,000.00) of insurance placed by him with you on July 22, 1924 on his hotel, restaurant, and pool and billiard hall, and barber shop in Morton, Washington. You will recall that this policy was divided six thousand dollars ($6,000.00) upon the building, and four thousand dollars ($4,000.00) upon the personalty, in the different parts of his establishment.

The amount of this check was the agreed amount of the premium and while under Mr. Milligan's arrangement with you he seems to have had sixty (60) days in which to pay the premium, yet since the fire has now occurred, and in view of the fact that the policy of insurance has not been delivered, for reasons well known to yourselves, and ourselves, yet the tender of the premiums is being made at this time for the protection of Mr. Milligan's rights.

Very truly yours,

SAW:ER. WRIGHT & WRIGHT,

By ————————.

(Testimony of W. A. Milligan.)

[Endorsed]: No. 4681. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 31, 1925. F. D. Monckton, Clerk.

Q. Mr. Milligan, what was the value of the contents of the various departments of that hotel, the furniture and equipment?

A. The whole thing, the furnishings, I valued at $9,500.

Q. And what was the value of the building?

A. $25,500.

Mr. SAM A. WRIGHT.—You may cross-examine. [43]

Cross-examination.

(By Mr. HULBERT.)

Q. I will take up the last statement you made regarding the payment of the $500 alleged premiums; that your attorneys sent, did they not?

A. They wrote the letter for me.

Q. And you sent the premium, the $500, to Mr. Voorhees, after you had consulted your attorneys about commencing a suit? A. No, sir.

Q. After you had put the matter in the hands of the attorneys, at least? A. Yes, sir.

Q. And Mr. Voorhees sent that check back to you through your attorneys, did he not?

A. After about 60 days.

Q. I am asking you if he did not send it back to you through your attorneys? You can answer that without any argument. A. Yes, sir.

Q. Is that the letter you received from Mr.

(Testimony of W. A. Milligan.)

Voorhees through your attorneys enclosing that check which gives the excuse or reason for not having sent it before? (Handing to witness.)

Mr. SAM A. WRIGHT.—I object. You are drawing a conclusion from the letter.

Mr. HULBERT.—I will offer the letter in evidence.

Mr. SAM A. WRIGHT.—We have no objection.

The COURT.—It may be admitted. [44]

(Letter admitted in evidence and marked Defendant's Exhibit "A.")

Mr. HULBERT.—I desire to read the letter to the jury.

(Reading said Exhibit "A.")

DEFENDANT'S EXHIBIT "A."

8952. Defendant's Exhibit "A." Admitted.

Lem W. Bowen, President
D. M. Ferry, Jr., Vice-President
Dwight Cutler, Vice-President
J. S. Heaton, Vice-President & Treasurer
J. H. Thom, Vice-President
Kennedy R. Owen, Vice-President
Charles C. Bowen, Secretary

Incorporated 1884.

STANDARD

ACCIDENT INSURANCE COMPANY,

OF DETROIT, MICHIGAN.

EDWIN R. VOORHIES.
District Agent
Morton, Wash.

October 2, 1924.

(Testimony of W. A. Milligan.)

Mr. W. A. Milligan,
Care Wright and Wright,
Attorneys at Law,
Seattle, Washington.

Dear Sirs;—

On August 4th, 1924, you sent me the enclosed certified check for $500. on the National Bank of Commerce. This check was sent by your Attorneys, Wright and Wright and purported by them to be the premium on insurance which was not issued nor accepted by me or the Company I represent.

I would have returned this check at that time, but I did not know your address and have not been able to find out, hence I am returning it through the same source in which you sent it.

Yours very truly,

ERV/MS E. R. VOORHIES,
Registered to Wright and Wright,
#629—31-33 Burke Building,
Seattle, Wash.

[Endorsed]: No. 4681. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 31, 1925. F. D. Monckton, Clerk.

Q. (Mr. HULBERT.) At the time you claim you got this insurance upon this building, how long had you owned the building?

A. The first policy?

Q. How long had you owned the building?

A. There are two insurance policies.

(Testimony of W. A. Milligan.)

The COURT.—Tell us when you bought the building.

Q. (Mr. HULBERT.) I am not asking you about your policy of insurance, but I am talking about this alleged oral contract of insurance that you are suing on. How long prior to that time had you owned this building? A. Two months.

Q. And how much insurance was there on that building already? A. $16,200.

Q. And you went on Tuesday and talked with Mr. Voorhees, on Tuesday I understand?

A. Yes, sir.

Q. About the insurance, and you talked with him on Wednesday. A. Yes, sir.

Q. On Wednesday morning at 11 o'clock?

A. Yes, sir.

Q. And again on Wednesday evening?

A. Yes, sir.

Q. Did you not ask him again on Wednesday evening whether or [45] not you were covered?

A. I did not.

Q. Do you remember meeting Mr. Voorhees Saturday morning just after the fire? A. Yes, sir.

Q. Is it not true that you asked Mr. Voorhees this question in the presence of Claud Morris, of Morton, did you not ask Mr. Voorhees at that time if that insurance was in force? A. No, sir.

Q. Or words to that effect?

A. Something to that effect.

Q. And is it not true that Mr. Voorhees told you

(Testimony of W. A. Milligan.)

that he did not know, that he would have—he had not heard from Seattle? A. It is not true.

Q. Or words to that effect? A. No, sir.

Q. Is it not true that right from the start Mr. Voorhees told you sir, that he would take it up with Seattle to see whether or not they would place more insurance on that building? A. It is not.

Q. After the fire you came to Seattle on Saturday? A. Yes, sir.

Q. And where did you go on Saturday to inquire about this insurance?

A. I did not go anywhere to inquire about insurance.

Q. Did you not go to Seeley & Company, Insurance Agents, in this town, to ask them about the Washington State [46] Underwriters?

A. I did not.

Q. Do you know Mr. Brennan in Seeley & Company's office? A. No, sir.

Q. Will you tell the jury you did not go to Seeley & Company's office and ask Mr. Brennan there about the Washington State Underwriters, telling him you had your building insured in an oral agreement in the Washington State Underwriters? A. I will.

Q. You did not call at Seeley's office at any time?

A. I did.

Q. When was that? A. I think on Monday.

Q. On Monday? A. Yes, sir.

Q. And you went there and asked about the Washington State Underwriters, did you not?

(Testimony of W. A. Milligan.)

The COURT.—When was this, before or after the fire?

Mr. HULBERT.—After the fire.

Q. (Mr. HULBERT.) Was it the Monday after the fire? A. Yes, sir.

Mr. HULBERT.—Thank you, your Honor.

Q. You went to Seeley & Company's office, insurance agents, of this town, did you not?

A. Yes, sir.

Q. And you went there for what purpose?

A. I asked—I am acquainted with Mr. Seeley—

Q. What was your purpose in going there?

A. Asking about the strength of the company. [47]

Q. Do you tell this jury that you went to Seeley & Company's office merely for the purpose of asking about the strength of this company?

A. I did.

Q. Whom did you meet there?

A. I could not say who it was, but I think it was Mr. Crawford.

Q. Did you not meet Mr. Brennan there?

A. I do not know him.

Q. Did you not tell Mr. Brennan you had *arrange* for fire insurance in the Washington State Underwriters? A. I did not.

Q. And is it not the truth also that you said you had had your arrangements with a man named Voorhees at Morton, and they looked it up, looked up the record and found that they didn't have any

(Testimony of W. A. Milligan.)

agent there, and they told you then and there that they did not have any such agent at Morton?

A. They did not.

Q. You then say you went there simply for the purpose of finding out the strength of the Washington State Underwriters or the National Liberty Insurance Company?

A. I asked about the company, yes. I asked about the company, yes.

Q I asked if that was your purpose. Will you tell the court and jury that your purpose in going to Seeley & Company's office, insurance agents in this town, was to find out the strength of the National Liberty Insurance Company?

Mr. SAM A. WRIGHT.—I object to that on the ground that the question has been already answered. [48]

The COURT.—A certain amount of repetition is permissible on cross-examination.

Q. (Mr. HULBERT.) Answer the question.

A. Yes.

Mr. HULBERT.—That is all, sir.

Redirect Examination.

(By Mr. SAM A. WRIGHT.)

Q. Mr. Hulbert asked you how much insurance there was on that building, and I understood you to say $16,200. Was that all on the building?

A. On the building and the furnishings. There was $1,200 on the furniture and $15,000 on the building.

(Testimony of W A. Milligan.)

Q. And he asked you what the conversation was with Mr. Voorhees on the Saturday morning after the fire. State to the jury what the conversation was that he was asking you about.

A. I was standing about where the hotel was and Mr. Voorhees came up, and I said, "There will be no question about that insurance?" and he got kind of mad and he said, "I told you 3 or 4 times you were insured, and that you were insured since last Tuesday noon."

(Witness excused.) [49]

TESTIMONY OF EDWARD LAMPING, FOR PLAINTIFF.

EDWARD LAMPING, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. SAM A. WRIGHT.)

Q. Your name is Edward Lamping?

A. Yes, sir.

Q. You live in Seattle? A. Yes, sir.

Q. You are connected with the firm of Lamping & Company? A. Yes, sir.

Q. What is your telephone number?

A. Main 6222.

Q. And that was your telephone number on July, 23d, last year? A. Yes, sir.

(Witness excused.) [50]

TESTIMONY OF E. R. VOORHEES, FOR PLAINTIFF.

E. R. VOORHEES, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. SAM A. WRIGHT.)

Q. Your name is what? A. E. R. Voorhees.

Q. What is your business?

A. In the insurance business.

Q. Whereabouts?

A. At Morton, Washington.

Q. And you were the agent of the National Liberty Insurance Company of America?

A. Yes, sir.

Q. Do you recall a conversation that you had over the telephone on July 23d last, with Lamping & Company? A. Yes, sir.

Q. With whom did you talk?

A. With Mr. Lamping.

Q. Edward Lamping, the gentleman who just left the witness stand? A. Yes, sir.

Mr. SAM A. WRIGHT.—That is all.

(Witness excused.) [51]

TESTIMONY OF JUNE MACKIE, FOR PLAINTIFF.

JUNE MACKIE, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. SAM A. WRIGHT.)

Q. Your name is June Mackie? A. Yes, sir.

Q. Where do you live?

A. At Morton, Washington.

Q. How long have you lived there?

A. About 3 years.

Q. What is your business?

A. I work for the Telephone Company at Morton.

Q. Were you the telephone operator at Morton, Washington, on July 23d, last year? A. Yes, sir.

Q. Do you know Mr. Voorhees? A. Yes, sir.

Q. Who just left the stand? A. Yes, sir.

Q. Did you have occasion to place a long distance telephone call for him on July 23d, last?

A. Yes, sir.

Q. Do you remember to whom that call went?

A. It went to Main 6222, Seattle, Lamping & Company.

Q. Did you hear the conversation that Mr. Voorhees had on that occasion? A. Yes, sir. [52]

Q. What did you hear Mr. Voorhees say on that occasion?

Mr. HULBERT.—I object to that as being incompetent, irrelevant and immaterial, and not proper testimony.

(Testimony of June Mackie.)

The COURT.—It seems so to me.

Mr. SAM A. WRIGHT.—It has particular reference to this contract of insurance.

The COURT.—But it is—

Mr. SAM A. WRIGHT.—It has reference to the issuance of the policy and sending of the necessary forms so this agent could prepare the policy.

The COURT.—Before or after the fire.

Mr. SAM A. WRIGHT.—Before the fire, July 23d.

The COURT.—The objection is overruled.

Mr. HULBERT.—Note an exception.

Mr. CLARKE.—She does not know whether it was Mr. Voorhees of Mr. Lamping or either of them.

The COURT.—She says she does.

Mr. CLARKE.—How could she know it was Mr. Lamping that Mr. Voorhees was talking to?

The COURT.—It will be for the jury to say ultimately. The objection is overruled. Proceed.

Q. (Mr. SAM A. WRIGHT.) Tell us what you heard Mr. Voorhees say over the telephone that morning.

A. He said, "This is Mr. Voorhees at Morton," and he said, "I insured Mr. Milligan last evening for $10,000, $4,000 on furniture and $6,000 on the building," and he said, "There is a letter in the postoffice for you now, and I haven't that form of policy," and he said, "If you want to fix the policy and send it back to me [53] O. K., and if you do not, send the form back and I will fix the policy myself."

(Testimony of June Mackie.)

Q. That is the conversation as you recall it?

Mr. SAM A. WRIGHT.—That is all.

Cross-examination.

(By Mr. HULBERT.)

Q. How long have you worked at Morton?

A. I started working a year ago, May 2d.

Q. And you were the long distance girl there at Morton, were you?

A. Well, long distance, it is just a small board, one long distance line and one local line.

Q. You take a lot of calls out of town there?

A. Yes, sir.

Q. And you have a lot of local calls as well as long distance calls? A. Yes, sir.

Q. And for different people? A. Yes, sir.

Q. From all over the country?

A. Just from three different towns, yes, sir, we take calls from all over.

(Witness excused.) [54]

TESTIMONY OF A. W. BAGLEY, FOR PLAINTIFF.

A. W. BAGLEY, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. SAM A. WRIGHT.)

Q. Your initials are what, Mr. Bagley?

A. A. W.

(Testimony of A. W. Bagley.)

Q. Where do you live?

A. I am living now in Tacoma.

Q. Where were you living on July 22d, last year?

A. With Mr. Milligan at the Morton Hotel.

Q. You were stopping at the hotel?

A. Yes, sir.

Q. What is your business?

A. I am a locomotive engineer.

Q. For the Milwaukee? A. Yes, sir.

Q. How long have you been such?

A. Since 1900.

Q. Where did you spend your evenings during the latter part of July, last year?

A. Well, summer evenings—

Q. I mean were you living there, where were you making your home?

A. Right at Morton with Mr. Milligan.

Q. At his hotel? A. Yes, sir.

Q. Do you know Mr. Voorhees, the agent for the defendant [55] company?

A. I have met him while I was up there is all.

Q. Did you hear a conversation between Mr. Voorhees and Mr. Milligan relating to an insurance matter, at any time?

A. I heard something pertaining to insurance.

Q. About when was that, Mr. Bagley?

A. That was about three or four days prior to the fire.

Q. And where was the conversation—where did the conversation take place?

A. In the hotel lobby.

(Testimony of A. W. Bagley.)

Q. Just what was that conversation that you heard, as near as you now remember it?

A. Well, I heard Mr. Voorhees say, "You should take out more insurance," and Mr. Milligan said, "I cannot stand it." He said, "I am pretty near broke now," and Mr. Voorhees was writing something on a paper, I do not know what it was, over at the desk, and then he started going out the door and Mr. Milligan asked him, he said, "When does this take effect?" and he said, "You are insured immediately, right now." He said, "If she burns down tonight you are covered."

Q. Did you hear the name of the insurance company mentioned?

A. Why, Mr. Milligan asked him what insurance company this was and he said, "The same as your little policy, the National" something.

Q. The National something? A. Yes, sir.

Q. Do you recall, at this time, any other portion of the name? [56]

A. I do through my subpoena. I now know that it is the National Liberty.

Q. That conversation was how many days before the fire? A. Three or four days.

Mr. SAM A. WRIGHT.—That is all.

Cross-examination.

(By Mr. HULBERT.)

Q. How long had you been living there with Mr. Milligan? A. About 6 weeks.

Q. Living at the hotel?

(Testimony of A. W. Bagley.)

A. Yes, sir. They had just switched our run around so we had to lay over at Morton at night.

Q. You were not interested in the Hotel?

A. No, sir.

Q. And you were not interested in any insurance on the hotel? A. No, sir.

Q. The conversation as far as you were concerned was a casual one and you had no interest in it?

A. I had no particular interest in it, but I was kind of inquisitive when I heard insurance was mentioned, to know what insurance would cost a man in a town like that.

Q. Otherwise you did not have anything to do with it or go into it in any way?

A. No, sir. I talked with Mr. Milligan afterwards.

Q. I am not asking you about that. There was conversation between Mr. Milligan and Mr. Voorhees that you did *not* [57] *all,* was there not?

A. Yes, sir, part of it.

(Witness excused.)

TESTIMONY OF W. T. FLETCHER, FOR PLAINTIFF.

W. T. FLETCHER, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. SAM A. WRIGHT.)

Q. Your name is W. T. Fletcher? A. Yes, sir.

Q. What is your business?

(Testimony of W. T. Fletcher.)

A. I am in the insurance business now.

Q. Did you formerly live at Morton?

A. Yes, sir.

Q. Were you living there at the time this fire took place? A. Yes, sir.

Q. You were in business there? A. Yes, sir.

Q. Are you acquainted with Mr. Voorhees, the agent of the defendant company?

A. Yes, sir. [58]

Q. Are you acquainted with Mr. Milligan, the plaintiff? A. Yes, sir.

Q. Did you have occasion to hear any conversation that took place between Mr. Milligan and Mr. Voorhees before this fire? A. Yes, sir.

Q. When was that? A. The night of the fire.

Q. And where was that conversation?

A. In the lobby of the hotel.

Q. What time in the evening

A. I suppose about 7 o'clock. I think right after I had had my supper.

Q. Tell the jury what that conversation was, as you remember it.

A. I was sitting in the lobby reading the paper, and I heard Mr. Voorhees and Mr. Milligan, who were sitting behind me, talking, and I took a little interest in insurance—

The COURT.—I know, but just tell us what you heard.

A. (Continuing.) I heard Mr. Milligan ask Mr. Voorhees if that insurance was all right, or practically that. I do not know that those were the

(Testimony of W. T. Fletcher.)

words, I cannot remember the exact words, and I heard Mr. Voorhees say, "Yes, that is all right." That is all I remember about it.

Mr. SAM A. WRIGHT.—You may cross-examine.

Mr. HULBERT.—There is nothing to ask him.

(Witness excused.)

Mr. SAM A. WRIGHT.—The plaintiff rests. [59]

(Whereupon Mr. Hulbert made an opening statement to the jury of the defendant's case.)

DEFENDANT'S CASE.

TESTIMONY OF E. R. VOORHEES, FOR DEFENDANT.

E. R. VOORHEES, called as a witness on behalf of the defendant, having theretofore been duly sworn, testified as follows:

Direct Examination.

(By Mr. HULBERT.)

Q. What is your name? A. E. R. Voorhees.

Q. You have been sworn? A. Yes, sir.

Q. Where do you live?

A. At Morton, Washington.

Q. What is your business? A. Insurance.

Q. And how long have you lived at Morton?

A. Right in the city almost 2 years.

Q. And you have been engaged in the insurance business since that time? A. Yes, sir.

(Testimony of E. R. Voorhees.)

Q. You were appointed agent for the National Liberty Insurance [60] Company, the defendant in this case? A. Yes, sir.

Q. Did you ever at any time, have the blank insurance policies of the National Liberty Insurance Company so you could write the policies at Morton?

A. No, sir.

Q. In all of your course of dealings with the National Liberty Insurance Company have you ever written a policy of insurance upon your own instigation, at Morton? A. No, sir.

Q. What has been and what was your arrangement with Lamping & Company as to the National Liberty Insurance Company and the other company he represented that you were agent for?

Mr. SAM A. WRIGHT.—We object to that. Prior secret instructions in that respect would not be material here, or competent.

The COURT.—The object is to bring forth the circumstances rendering more likely his defense that he did not undertake at this time to write this policy without submitting it to the general agent. For that purpose it is competent, and it will be for the jury to pass upon the weight to be given to it. The objection is overruled.

(Last question read.)

A. I submitted my applications to Lamping & Company.

Q. (By Mr. HULBERT.) For what purpose?

A. For whatever disposition they cared to make of it.

(Testimony of E. R. Voorhees.)

Q. Was it your custom and was it your dealing all the time, from the start, with those companies that the insurance [61] you submitted was to be accepted or rejected by Lamping & Company?

Mr. SAM A. WRIGHT.—We object to that as leading.

The COURT.—I think so, but it has been fully answered. He said it was sent to them to do with as they pleased. The objection is sustained.

Q. (Mr. HULBERT.) Did you ever at any time, as far as those companies were concerned, determine yourself upon whether you should issue the policy or not, and issue the policy yourself?

A. No, sir.

Q. Do you remember, Mr. Voorhees, having a conversation with Mr. Milligan regarding insurance upon his hotel? A. Yes, sir.

Q. Now, let me ask you this. When was that, when was the first conversation you had with reference to this $10,000 insurance?

A. It was the afternoon of July 22, 1924.

Q. At that time had you had any dealings with Mr. Milligan regarding insurance?

A. No, sir—yes, on another policy, but not this one.

Q. That is what I mean, another policy.

A. Yes, sir.

Q. Did you submit to Lamping & Company an application for a $2,000 policy before that time?

A. What?

Q. Had you before that time, submitted *an* re-

(Testimony of E. R. Voorhees.)

ceived a policy from Lamping & Company for Mr. Milligan for $2,000? A. Yes, sir. [62]

Q. On what, what did it cover, the same property?

A. Yes, sir.

Q. Was that policy ever delivered to Mr. Milligan? A. No, sir.

Q. Why not?

A. I do not deliver a policy until they pay the premium.

Q. And was that policy cancelled? A. Yes, sir.

Q. Why? A. At Mr. Milligan's request.

Q. For what reason?

A. He said he could not meet the premium.

Q. How long was that before July 22, 1924?

A. My records show it was cancelled July 15th, for nonpayment of premium.

Q. Now then, on July 22d, you talked with him again about additional insurance? A. Yes, sir.

Q. What did you say to him about that insurance?

A. I just answered his questions that he made to myself and asked a few questions about insurance.

Q. Did you enter into a contract of insurance with him?

Mr. SAM A. WRIGHT.—We object to that as leading and calling for his conclusion.

The COURT.—The objection is sustained.

Q. (Mr. HULBERT.) Let me ask you this. Just what did take place?

A. He came to my office and said he wanted to ask me a question, and I said, "Proceed," and, "I

(Testimony of E. R. Voorhees.)

will answer if I can." And he said he had a $12,000 mortgage, as I [63] remember it, on the hotel, in the Pacific Savings & Loan Association of Tacoma, and they held an insurance policy to that amount, and he wanted to know of me, in case of loss, whether or not he would get a part of that insurance or whether the Pacific Savings & Loan Association would get it all.

Q. What did he say about taking out more insurance on the property, did he ask for more insurance?

A. He said he ought to have more insurance.

Q. What did you do? Tell me what you did then.

A. He asked me to come over to the hotel and look it over for the purpose of writing more insurance.

Q. Did you go over to the hotel and look it over?

A. Yes, sir.

Q. Then what did you tell him you would do?

A. I looked the building over and suggested some improvements, cleaning up rubbish, and he said he wanted more insurance.

Q. Well, then what did you do after that, did you take it up with Lamping & Company?

A. I did.

Q. When? A. The next morning.

Q. What, if anything, did you say to Mr. Milligan about taking it up with Lamping & Company, or anybody else? Do you understand my question?

A. No, sir.

Q. I am asking you did you say anything to Mr.

(Testimony of E. R. Voorhees.)

Milligan about taking up this question of additional insurance with Lamping & Company, or anybody else? [64] A. At one time I did.

Q. When was that?

A. That was Tuesday evening.

Q. Just what did you say to him about it?

A. I told him I would take it up with my company.

Q. Then the next morning you made an examination of the building?

A. I did Tuesday afternoon.

Q. And you then telephoned and talked with Mr. Lamping over the telephone? A. I did.

Q. Did you say over the telephone, Mr. Voorhees, to Mr. Lamping, that you had insured this hotel for $10,000? A. I did not.

Q. Did you say to Mr. Lamping that you did not have copies of the policy and that you wanted him to send them down to you?

Mr. SAM WRIGHT.—We object to that as leading.

Mr. HULBERT.—This is calling attention directly to the question asked the telephone girl. There is no other way that I can do it.

The COURT.—There are two ways it can be done, but I understand the rule is that it is permissible to put a direct question the same as if you were offering it for impeachment. The objection is overruled.

(Last question read.)

A. No.

(Testimony of E. R. Voorhees.)

Q. (Mr. HULBERT.) That would be on July 23d, would it not, Wednesday was July 23d, was that the first time you took [65] it up with Mr. Lamping? A. Yes, sir.

Q. After that conversation did you write to Mr. Lamping? A. Yes, sir.

Q. Is that the letter you wrote to Lamping & Company? (Handing witness letter.) A. Yes, sir.

Mr. HULBERT.—I will offer this letter in evidence.

Mr. ELIAS A. WRIGHT.—We object to this as purely a self-serving declaration between these two agents and something that was never communicated to the plaintiff in any way.

Mr. HULBERT.—It shows the dealings, and not only that but it contradicts the testimony they have already put in here regarding the telephone conversation. They said there was a telephone conversation and it is a part of the *res gestae,* a part of what took place during the transaction between these parties. It shows exactly what they did do. It was at the time this transaction was going on. It is not something that took place afterwards when they were contemplating trouble, but it is a part of the *res gestae* and a part of the original transaction at the time when they claim this contract was entered into. It is not a self-serving declaration that was made after they got into trouble, to protect themselves, and it is not such a statement that they would make in advance in their favor. It is a part of the [66] arrangement made at the

very time the transaction took place. It is proof in contradiction of the plaintiff's own testimony.

Mr. ELIAS A. WRIGHT.—It does not pertain to the telephone conversation.

The COURT.—The issue is whether this witness as the agent for the defendant undertook to insure the plaintiff's property on July 22, 1924, and the negotiations, both parties agree, whatever they were, took place between Mr. Milligan, the plaintiff, and this witness, as the agent of the defendant. Mr. Milligan says there was a contract entered into right then and there, and this witness apparently is going to say that there was not, and he had already said that he merely said to Mr. Milligan, "I will take it up with *Mr.* Company," and now they offer to support it in a way, to corroborate this witness in the fact that he did take it up with his company, by these letters, showing he asked the company as to whether or not it would accept this insurance on Mr. Milligan's property. I think it is admissible, but it is not at all conclusive. If the jury finds he did agree with Mr. Milligan that he would insure it outright, not telling Mr. Milligan he would submit it to the company, the mere [67] fact that thereafter he may have taken it up with his company would not at all affect the arrangements thus made with Mr. Milligan if it was made as Mr. Milligan stated, but the defendant offers this as tending to show he could not have agreed as Mr. Milligan said, but yet he may have agreed as Mr. Milligan says without having the right to do so, and if the

defendant's theory is sound and he then took it up with the company thinking he could get his company to take the policy, it would be merely a corroborating circumstance if the jury takes it as such, and I think it is material and competent, and the objection will be overruled. Proceed.

(Mr. Hulbert then read Defendant's Exhibit "B" to the jury.)

DEFENDANT'S EXHIBIT "B."

#8592. Defts. Ex. "B." Admitted.

M. J. AVERBECK,
Chairman of the Board.

CHARLES H. COATES,
President.

WASHINGTON UNDERWRITERS.

HERBERT A. CLARK,
Manager.

ROBERT C. HOSMER,
Asst. Manager.

New York.

Western Department 207 North Michigan Boulevard, Chicago, Ill.

E. R. VOORHIES
Resident Agent.

Morton, Washington, July 23, 1924.

Lamping and Co.
Seattle.

Dear Sirs;

Attention of Mr. Lamping.

In accordance with my talk with you to-day over the phone, Mr. A. W. Milligan who owns and runs the Morton Hotel here wishes $6,000. insurance on the Hotel in addition to what he is now carrying, which is $15,000. also Mr. Milligan wishes $4,000.

(Testimony of E. R. Voorhees.)

more on the Hotel furnishings and fixtures, in addition to the $1200. he now has.

This Hotel is on second street facing east and is worth around $25,000, is in a good condition and I think is doing a good business. The place has recently been thoroughly repaired and refurnished in a splendid manner.

The mortgage on the building is $12,000 and on the fixtures and furnishings $1200. but the latter was on before the new fixtures were put in.

As it stands Mr. Milligan has no insurance on his equity in either. The place is steam heated and electrically lighted and modern in every way.

The published rate is /%500 and is in Block 13, Nos. 37, 38, & 39 of Sandborn's Map.

Very truly yours,

E. R. VOORHIES.

[Endorsed]: No. 4681. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 31, 1925. F. D. Monckton, Clerk.

Q. (Mr. HULBERT.) Now, did you receive a letter from Lamping & Company written on that same day? A. Yes, sir.

Q. Have you tried to find the original of that letter? A. I have.

Q. Have you been able to find it?

A. I have not.

Q. I will ask you to examine that and let me know whether that is an exact copy of the letter

(Testimony of E. R. Voorhees.)

you received from Mr. Lamping, written on July 23d, 1924? (Handing witness letter.)

A. I think it is an exact copy as near as I can tell.

Q. You remember receiving such a letter? [68]

A. Yes, sir.

Mr. HULBERT.—I will offer it in evidence.

Mr. SAM A. WRIGHT.—We object to it for the reasons already given, and it is not shown whether this letter was received before or after the fire, and whether the contents were ever disclosed to the plaintiff.

The COURT.—What is that letter?

Mr. HULBERT.—This is a letter written by Lamping & Company after the telephone conversation, to Mr. Voorhees upon the same date, and these letters crossed on the way, giving Mr. Voorhees instructions, showing the relations between the parties.

The COURT.—These letters, of course, are not evidence of the truth of their contents, but merely are the claim of the defendant corroborative of the fact that this witness did not undertake to issue the policy outright, but submitted it to his company. It is no more than if this witness and Mr. Lamping had noted it down that they had a talk that day. It would be for the jury to say whether they were truly written at that time, and whether or not in spite of it this witness did make the arrangement with Mr. Milligan as Mr. Milligan says he did. For that limited purpose they are admissible but not otherwise.

Mr. SAM A. WRIGHT.—We except to the ruling of your Honor. [69]

Mr. HULBERT.—I will read it.

(Said letter was then marked Defendant's Exhibit "C" and Mr. Hulbert read the same to the jury.)

DEFENDANT'S EXHIBIT "C."

8952. Defts. Exhibit "C." Admitted.

July 23, 1924.

E. R. Voorhies, Esq.,
Morton,
Washington.

Dear Sir:

With reference to telephone conversation regarding placing $6000.00 additional on W. A. Milligan's hotel building and $4000.00 additional on his hotel furniture and fixtures, we advise that we are unwilling to handle any further insurance for Mr. Milligan's account. On June first last we wrote $2000.00 upon his hotel furniture and this policy was cancelled at your request due to your inability to collect premium within the usual credit period. We have another policy that is still in force covering $1200.00 on hotel furniture and fixtures and we would much prefer to have this policy cancelled as we do not consider this desirable business. It is our belief that Mr. Milligan is over his head and this seems to be a fair conclusion as he was obliged to place a chattel mortgage upon his hotel furniture. In any event, we must insist upon the cancellation of the $1200. policy, which is #50419 of the WASHINGTON UNDERWRITERS of the NATIONAL

(Testimony of E. R. Voorhees.)

LIBERTY, if Mr. Milligan succeeds in obtaining the additional insurance that he is asking for, which will mean that he is carrying $21,000. on the hotel building and $5,000. upon its furniture. The property will be really overinsured if he carries any such amounts of protection. An overinsured risk is the most undesirable proposition there is. If you could recover policy #50419 forwarding to us at an early date, we would be very glad to have all of our liability terminated on the Milligan hotel risk. Please advise.

Yours very truly,
LAMPING & COMPANY, INC.
By ————————————,
EL/hs. General Agent.

[Endorsed]: No. 4681. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 31, 1925. F. D. Monckton, Clerk.

Q. (Mr. HULBERT.) Did you get a reply from Mr. Lamping to your letter of the 23d to him?

A. Yes, sir.

Q. Have you the original of that?

A. I think I have. Here it is. (Handing to Mr. Hulbert).

Mr. HULBERT.—I will offer this reply in evidence.

Mr. ELIAS A. WRIGHT.—And we make the same objection.

The COURT.—Let me see it.

(Letter handed to the Court.)

Mr. ELIAS A. WRIGHT.—That letter is dated

the 25th of July and could not have been received before the fire.

The COURT.—That is not the object. These letters are not proof of their contents, only to show the relation of this witness with Lamping & Company, namely, that he had no right to write insurance on this property, and even then if he entered into the contract of insurance if he did not have express authority to do it, still it would be binding upon the company, but it is corroborative of the statement that he did not undertake to insure this *proper* orally, as Mr. Milligan says he did. The objection is overruled. [70]

(Said letter was then admitted in evidence as Defendant's Exhibit "D" and Mr. Hulbert read the same to the jury.)

DEFENDANT'S EXHIBIT "D."

8592. Defts. Ex. "D." Admitted.

Lem W. Bowen, President
D. M. Ferry, Jr., Vice-President
Dwight Cutler, Vice-President
J. S. Heaton, Vice-President & Treasurer
J. H. Thom, Vice-President
Kennedy R. Owen, Vice-President
Charles C. Bowen, Secretary

Incorporated 1884

STANDARD
ACCIDENT INSURANCE COMPANY
OF DETROIT, MICHIGAN.

LAMPING & COMPANY, Inc.,
General Agents,
250 Colman Bldg.
Seattle, Washington,
Phone Main 6222.

(Testimony of E. R. Voorhees.)

July 25, 1924.

E. R. Voorhies, Esq.
Morton,
Washington.

Dear Sir:

We acknowledge receipt of your July 23rd letter with reference to the Milligan insurance. I presume our letters crossed and that you had not received our declination of this business prior to writing your letter of the 23rd. In any event, we cannot handle additional insurance for Mr. Milligan and it is our decided preference to be relieved of the $1200.00 policy that we are now carrying. Please advise.

Yours very truly,
LAMPING & COMPANY, Inc.
By E. LAMPING,
General Agent.

EL/hs.

1884—1924

The "Standard's" 40th Year of Growth and Experience.

[Endorsed]: No. 4681. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 31, 1925. F. D. Monckton, Clerk.

Q. When did you receive those letters, Mr. Voorhees?

A. The first one I received, the first letter there a copy of which you have, I received it Saturday morning after the fire.

Q. Then when did you receive the second letter,

(Testimony of E. R. Voorhees.)

the answer to your first letter, the original you handed me, the one dated July 25?

A. I am not positive whether it was—but I think it was Monday. It was either Saturday or Monday or Tuesday, not later than Tuesday. It was after the fire I know.

Q. And you say you received Mr. Lamping's first letter on the 23d after the fire on Saturday?

A. Yes, sir.

Q. Where were you on Friday, the day before the fire?

A. I was in a farming section about 15 miles south of Morton.

Q. About what time did you go over there?

A. Early in the morning.

Q. Early in the morning. Did you call for your mail before you went over there?

The COURT.—What is the purpose of this?

Mr. HULBERT.—To show the reason why he did not get it.

The COURT.—Do not cross-examine him. Leave that for the other side to do.

Q. (Mr. HULBERT.) Then what did you do? What time did you get back? A. Late at night.

Q. About what time? [71]

A. I should think 8 o'clock.

Q. About 8 o'clock? A. Yes, sir.

Q. Did you see Mr. Milligan immediately after the fire or shortly after the fire? A. I did.

Q. Where were you when you saw him?

A. On the street near the location of the hotel.

(Testimony of E. R. Voorhees.)

Q. Did any conversation take place between you at that time? A. Yes, sir.

Q. What did Mr. Milligan say and what did you say?

A. Mr. Milligan asked me if that insurance was in force.

Q. And what did you say?

A. I said, "I do not know; I hope so."

Q. Was there any further conversation between you at that time than that?

A. Not that I remember of.

Q. Did you see him Friday night?

A. No, sir.

Q. You did not see him at all Friday night?

A. No, sir.

Q. Your first conversation with reference to any additional insurance was on Tuesday, you say, and did you see him again Wednesday night?

A. I did.

Q. What was said then?

A. He asked me if that insurance was in force.

Q. Wednesday night? A. Yes.

Q. And what did you tell him? [72]

A. I told him I thought so, but I did not know until I heard from Seattle.

Q. At that time had you heard from Seattle?

A. I had not.

Q. Did you at any time tell Mr. Milligan that he was covered? A. No, sir.

Q. Was the word "covered," ever used between you and Mr. Milligan?

(Testimony of E. R. Voorhees.)

A. Not to my recollection or knowledge.

Mr. HULBERT.—You may cross-examine.

Cross-examination.

(By Mr. SAM A. WRIGHT.)

Q. Now, you say you talked with Mr. Milligan Wednesday night? A. Yes, sir.

Q. Is that true? A. Yes, sir.

Q. And you told him you thought that his insurance was in force? A. Yes, sir.

Q. And you had talked with Mr. Lamping Wednesday morning, had you not? A. Yes, sir.

Q. Why did you tell him Wednesday evening you thought his insurance was in effect if your conversation with Mr. Lamping on Wednesday morning had already taken place, the conversation that you have referred to over the telephone?

A. We had— [73]

Q. What made you tell him Wednesday evening after you had talked with Mr. Lamping Wednesday morning, as you have testified, that you thought his insurance was in effect Wednesday evening?

A. I had no conversation to lead me to say otherwise.

Q. You had talked with Mr. Lamping Wednesday morning over the telephone? A. Yes, sir.

Q. Did you not testify that Mr. Lamping Wednesday morning told you he did not want that insurance?

The COURT.—No.

A. No, sir, I have not.

(Testimony of E. R. Voorhees.)

Q. (Mr. SAM A. WRIGHT.) You did not so testify? A. No, sir.

Q. But did you tell him Wednesday evening you thought this insurance was in effect?

A. Yes, sir, I told him I hoped so.

Q. You did write a $2,000 policy in addition to the $1200 policy? A. Yes, sir.

Q. And you did not receive any instructions from Mr. Milligan to write that $2,000 policy, did you; Mr. Milligan did not instruct you to write that policy, did he? A. He did.

Q. When was that policy written?

A. I think the first day of June.

Q. It was written, as a matter of fact, at the same time that you wrote this other policy of $1,200, was it not? A. I think the same day.

Q. It was written as of June 1st, and you countersigned it [74] on June 3d, that is correct, is it not?

A. I do not know the date I countersigned it.

Q. It was prepared at the same time this other policy, which was prepared, which is Plaintiff's Exhibit 7, that is correct, is it not, the $2,000 policy was prepared at the same time you prepared that policy? A. I think so.

The COURT.—I think the witness said so.

Mr. SAM A. WRIGHT.—I had not heard his answer.

Q. (Mr. SAM A. WRIGHT.) Is it not a fact when Mr. Milligan told you about that policy he told you he was not able to take that policy at that

(Testimony of E. R. Voorhees.)

time, that he had never ordered it, he told you that, did he not?

Mr. HULBERT.—I object to that as not proper cross-examination.

The COURT.—You showed that ti was cancelled, and he can show the reason why it was cancelled.

(Last question read.)

A. No, sir.

Q. He did not? A. No, sir.

Q. Did you ever deliver it to Mr. Milligan?

A. I do not think—I am sure I did not.

Q. You cancelled it July 15th?

A. That is what my record shows.

Q. Did you give Mr. Milligan any notice of that cancellation? A. He asked me to cancel it.

Q. He asked you to cancel that policy on July 15? A. Yes, sir.

Q. I want to call attention to the time you wrote this first [75] policy, or saw him about the first policy. You went to the hotel with Steve Bergon?

A. Yes, sir.

Q. Is it not a fact at that time you told Mr. Milligan in addition to the $1,200 policy that he should have $10,000 insurance? A. No, sir.

Q. And is it not a fact that this conversation took place in Steve Bergen's presence, that Mr. Milligan told you he appreciated he ought to have more insurance, but he could not afford to take care of it at that time, and that you should just write the $1,200 policy, and no more? A. No, sir.

Q. That is not true? A. No, sir.

(Testimony of E. R. Voorhees.)

Q. You spoke about a $1,200 chattel mortgage on the furniture, that was not a mortgage that Mr. Milligan had given? A. I understand not.

Q. Now was the mortgage which was on the property, the $12,000 mortgage, that was not his mortgage. You knew he had not given that mortgage? A. I know it by hearsay is all.

Q. You knew also the insurance outside of the $1,200 policy that you had written had been written on the property at the time Mr. Milligan bought the property?

A. I cannot say I did know it at that time.

Q. You discussed with Mr. Milligan, that matter, did you not? [76] A. Later.

Q. Now, you know Mr. W. T. Fletcher who testified here a few minutes ago? A. Yes, sir.

Q. Do you know him quite well? A. Yes, sir.

Q. Do you remember a conversation which you had with him on July 22d, in the evening immediately after you talked to Mr. Milligan about this insurance? A. I may have had a talk with him.

Q. You had one; and you went to his door and found him in the office, did you not, and you talked with him in the office, on July 22d, 1924, at about the hour of about 8 o'clock P. M., did you not?

A. I do not remember that.

Q. You do not remember that? A. No, sir.

Q. As a matter of fact did you not go to his office at that time, and at that place and tell Mr. Fletcher in a boisterous way that you were getting insurance in Morton— A. No, sir.

(Testimony of E. R. Voorhees.)

Q. —over the head and all around Mr. Carruthers, who was writing insurance there—

Mr. HULBERT.—I object to that as incompetent and immaterial.

The COURT.—The objection is sustained.

Mr. SAM A. WRIGHT.—I am laying the foundation for impeachment.

The COURT.—You can lay the foundation directly [77] for impeachment on anything that is proper in this matter.

Q. (Mr. SAM A. WRIGHT.) Did you not tell Mr. Fletcher at that time that you had insured Mr. Milligan that evening for $10,000?

A. No, not to my knowledge.

Mr. HULBERT.—I object to that, your Honor.

The COURT.—It is answered. The objection is overruled.

Q. (Mr. SAM A. WRIGHT.) You did not?

A. No, sir.

Q. You say you know Steve Bergon?

A. Yes, sir.

Q. Very well? A. Yes, sir.

Q. You felt a little uneasy after this fire up there, did you not?

Mr. HULBERT.—I object to that as calling for a conclusion of the witness.

The COURT.—The objection is overruled; this is cross-examination.

Q. (Mr. SAM A. WRIGHT.) You got uneasy after this fire, about your liability? A. No, sir.

Q. Did you not go to Chehalis and consult an at-

(Testimony of E. R. Voorhees.)

torney about it? A. About what?

Q. About whether you might become involved personally in this transaction?

A. I do not remember just when I went to Chehalis. [78]

Q. Do you remember a conversation that took place on the streets of Morton Friday morning, August 1st, at about 10:30 o'clock, between you and Mr. Bergon and Mr. Milligan in regard to this fire, and in regard to your insuring Mr. Milligan in this transaction? A. No, sir.

Q. I will ask you to state whether or not you did not go to Mr. Bergon on Thursday, July 31, and ask him to intercede with Mr. Milligan in an effort to get a release so far as you were personally concerned?

Mr. HULBERT.—I object to that.

A. I do not remember any such conversation.

Mr. HULBERT.—I object to that on the ground that it is incompetent, irrelevant and immaterial, and not proper cross-examination. He cannot lay the foundation for impeachment on an immaterial matter.

(Last question read.)

The COURT.—The plaintiff's theory is that this witness undertook to insure the plaintiff for and on behalf of the defendant, and the defendant says he had no authority to do that. If he went and asked for a release it might be under your insurance act, material, as showing his interest and as affecting his credibility. The question is proper and he

(Testimony of E. R. Voorhees.)

may answer. The objection is overruled.

Mr. HULBERT.—Note an exception.

(Last question read.)

A. I do not remember it. [79]

Q. (Mr. SAM A. WRIGHT.) Now, were you not talking with Mr. Bergon Friday morning, August 1st, about the matter as Mr. Milligan was going by, and was not Mr. Milligan stopped by Mr. Bergon and called over to where you and he were engaged in the conversation? A. I do not remember it.

Q. And did not Mr. Milligan come over and did not this conversation take place; did not Mr. Bergon say to Mr. Milligan, "Are you going to hold, or attempt to hold, Mr. Voorhees, in this matter, Mr. Milligan?" And did not Mr. Milligan make this response, "Why, no, it is his insurance company that I am seeking to hold," and then did not Mr. Bergon turn to you and say "Mr. Voorhees, you insured the man, did you not?" and did you not say, "Certainly, absolutely, I insured him. I insured him in the same company as the small policy." Did you not say that or those words, in substance?

A. No.

Mr. HULBERT.—I object to that as being wholly incompetent and immaterial and not binding on this insurance company.

The COURT.—It is for the purpose of impeaching this witness. They have a right to show he admitted he did, not as proof that he did, but to affect his statement that he did not, if the jury thinks it does. The objection is overruled.

(Testimony of E. R. Voorhees.)

Q. (Mr. SAM A. WRIGHT.) This letter of July 23d, from Lamping & Company, you say you did not receive until the Saturday morning after the fire? [80]

A. The Saturday morning after the fire.

Q. The letter was dated July 23d, and you said you received it on Saturday, the 26th?

A. Yes, sir.

Q. The letter which they wrote you or purported to have written you, dated July 25, you did not receive, you do not think, until Monday or Tuesday of the following week; is that correct?

A. I am not positive, but I think that is true.

Q. In any event you never received either letter until after this fire? A. No, sir.

Q. And therefore you did not communicate the contents of that letter, or either of those letters to Mr. Milligan? A. Verbally.

Q. When?

A. I do not remember the exact date, but it was after that.

Q. I will ask you to state whether or not it was not on the Monday after the fire when Mr. Milligan came up to see you from Seattle?

A. I do not remember.

Q. You do not remember? A. I do not.

Q. Is not your memory very good, Mr. Voorhees?

A. Usually good.

Q. Do you not recall any conversation that you had with Mr. Milligan about these letters?

A. No, sir. [81]

(Testimony of E. R. Voorhees.)

Q. I will ask you to state if this did not take place in your office on the Monday following the fire, at Morton, did not Mr. Milligan meet you on the street and you called him to your office and he told you he had been to see Lamping & Company and Mr. Lamping told him that he had written that they would not insure him, that they did not desire you to write that insurance, they said they had written you about that Saturday morning, and did you not tell him you had just received the letter, but you did not ask Lamping & Company what insurance you should write, but you wrote your own insurance?

Mr. HULBERT.—I object to that as being incompetent, irrelevant and immaterial, and improper.

The COURT.—For the same purpose, for the purpose of impeachment, the objection is overruled.

A. I do not remember.

Q. You do not remember? A. No, sir.

Q. Would you say that conversation did not take place? A. I would not say anything about it.

Q. You were at the hotel Friday evening before the fire? A. No, sir.

Q. You were not? A. No, sir.

Q. You say you know Mr. Fletcher?

A. Yes, sir.

Q. He has lived there as long as you have, has he not? A. I do not know.

Q. Do you tell this jury you were not in that hotel Friday [82] evening, July 25th, and engaged in a conversation with Mr. Milligan?

(Testimony of E. R. Voorhees.)

A. I was not.

Q. At the time when Mr. Fletcher was present and sitting in the lobby? A. No, sir, I was not.

Q. Mr. Fletcher was there in the merchandise business, was he not?

The COURT.—He knows him. There is no use talking about that.

Q. (Mr. SAM A. WRIGHT.) You spoke about you did not deliver policies until you collected the premiums on them. You delivered the $1,200 policy, did you not, without collecting the premium.

A. No, sir.

Q. You did not? A. No, sir.

Q. You did not require Mr. Bergon, the mortgagee, to guarantee the payment of that premium?

A. I asked him something about it.

Q. You took the precaution to have the premium on that policy guaranteed by Mr. Bergon?

A. I think I had some talk with him about it.

Q. You said that on Tuesday evening you spoke to Mr. Milligan about the rubbish that was around his hotel? A. Yes, sir.

Q. But the same day or the next day you wrote to Lamping & Company, the letter which has been introduced in evidence here, did you not?

A. Yes, sir. [83]

Q. As a matter of fact you told Mr. Milligan on Tuesday evening, did you not, that if he would make some changes and alterations that you objected to, that you would give him a lesser rate on his insurance? A. No, sir.

(Testimony of E. R. Voorhees.)

Q. You did not? A. No, sir.

Mr. SAM A. WRIGHT.—I think that is all.

(The Court thereupon admonished the jury as to their duties during the recess of the court, and a recess was taken until the hour of 2 o'clock P. M. June 3, 1925, at which time all parties being present as heretofore, the trial was resumed as follows, to wit:)

Mr. SAM A. WRIGHT.—I would like to ask Mr. Voorhees a few more questions on cross-examination, if I may.

E. R. VOORHEES, recalled to the witness-stand, as a witness on behalf of the defendant, testified as follows:

Cross-examination.

(By Mr. SAM A. WRIGHT.)

Q. Mr. Voorhees, how many typewriters have you in your office at Morton? A. Two. [84]

Q. Have you a stenographer?

A. Not at the present time.

Q. Handing you Defendant's Exhibit "B," was that letter written by you in your office?

The COURT.—Are you familiar with it?

A. Yes, I have read it all through, but as far as I can see, it was written by me.

Q. Handing you Defendant's Exhibit "A," was that written by you in your office? A. Yes, sir.

Q. You wrote that letter yourself, did you?

A. Yes, I think I did, as I remember it.

Q. I am speaking of Defendant's Exhibit "A."

A. Let me see it again, please.

(Testimony of E. R. Voorhees.)

(Exhibit "A" was handed the witness.)

A. Yes, sir.

Q. You wrote that yourself? A. Yes, sir.

Q. Will you tell the jury what the initials E. R. V./MS mean? A. E. R. V. are my initials.

Q. What does the M. S. mean? A. Myself.

Q. That is the designation which you placed on that letter? A. Yes, sir.

Q. Did you not place any such identification upon Defendant's Exhibit "B," did you?

A. It seems not.

Q. Both of those letters were written upon the same typewriter? [85] A. I do not know.

Q. You say in this letter, Defendant's Exhibit "A," that the reason you had not returned this check to Mr. Milligan was that you did not know what his address was? A. Yes, sir.

Q. Do you recall about the middle of September Mr. Milligan and his wife being in Morton?

A. I do not?

Q. You do not recall it?

A. He was in Morton at one time, but I do not remember the time.

Q. Do you remember talking with Mrs. Milligan at that time? A. I do not.

Q. You said nothing to her, or to either of them at that time, about returning this certified check?

A. I do not remember.

Q. When you received this certified check for $500, do you recall advising your friend Bergon about it? A. I may have, I do not recall it.

(Testimony of E. R. Voorhees.)

Q. Did you tell him when you received that check you were going to deduct $75, the amount of your commission, and send the rest to the company?

A. I do not remember any such talk.

Q. You do not remember it? A. No, sir.

Q. Would you say no such conversation took place?

A. I will say I do not think any such conversation took place. [86]

Mr. SAM A. WRIGHT.—That is all.

Redirect Examination.

(By Mr. HULBERT.)

Q. Regarding that $2,000 policy, Mr. Voorhees, that there has been so much talk about, was that policy written in the defendant National Liberty Insurance Company? A. No, sir.

Q. Did the National Liberty Insurance Company, the defendant in this case, have anything to do with that $2,000 policy that they have talked about here?

A. No, sir.

Q. What company did you write that in?

Mr. ELIAS A. WRIGHT.—I think that is immaterial.

The COURT.—I suppose the jury has been assuming the same thing that I have about that matter. He may answer.

A. It was written in the North American and British Mercantile.

Q. (Mr. HULBERT.) That North American British Mercantile Company is one of Mr. Lamping's companies? A. Yes, sir.

(Testimony of E. R. Voorhees.)

Q. And even in that company, I will ask you whether or not you wrote the policy or where it was prepared?

A. Mr. Lamping wrote the policy, or it was written in his office, I mean.

Q. And it was prepared and sent down to you?

A. Yes, sir. [87]

Q. And you countersigned it as local agent after it had reached you? A. Yes, sir.

Q. During any of the time of these negotiations between you and Mr. Milligan was there ever anything said about any company, any particular insurance company? A. No, sir.

Q. Was the National Liberty Insurance Company or any other company mentioned in your negotiations with him? A. No, sir.

Q. Did you know at the time that you took the matter up by telephone or in writing, with Lamping & Company, even if Lamping & Company would have accepted it, did you know then, in what company this insurance would be written

A. I did not.

Q. How many companies do you represent down there? A. Three.

Q. You represent another company in which you have the policies, that you can write, do you not?

A. Yes, sir.

Q. Does Lamping & Company have anything to do with that company? A. No, sir.

Q. What is the name of it?

A. The Franklin Fire Insurance Company.

(Testimony of E. R. Voorhees.)

Q. And you have policies there in that company that you do write?

The COURT.—He has answered the question.

A. Yes, sir. [88]

Q. (Mr. HULBERT.) You had those at the time of the fire too, didn't you? A. Yes, sir.

Q. And at the time of your negotiations with this man? A. Yes, sir.

Mr. HULBERT.—I think that is all.

Recross-examination.

(By Mr. SAM A. WRIGHT.)

Q. Did you not explain to Mr. Milligan on Monday, after this fire, that this particular company, the National Liberty Insurance Company, was the only company you could write such a risk as that in?

A. No, sir.

Q. As that hotel? A. No, sir.

Q. Did you not sit down and talk with him and explain the details about that? A. No. sir.

(Witness excused.) [89]

TESTIMONY OF JOSEPH T. BRENNAN, FOR DEFENDANT.

JOSEPH T. BRENNAN, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. HULBERT.)

Q. State your full name to the jury.

A. Joseph T. Brennan.

(Testimony of Joseph T. Brennan.)

Q. And what is your business? A. Insurance.

Q. Where are you employed?

A. At Seeley & Company.

Q. How long have you been with them?

A. About a year and a half.

Q. In what capacity?

A. Until the first of this year I have been in charge of the fire insurance department.

Q. How long were you in charge of that department? A. A year and 5 months.

Q. Did you ever see Mr. W. A. Milligan, sitting here? A. Yes, sir, I recall the gentleman.

Q. Do you remember the time of the Morton fire?

A. Yes, sir, I remember reading about it in the paper.

Q. Where did you see Mr. Milligan?

A. At our office in the Coleman Block.

Q. When?

A. On the Monday following the fire.

Q. Did you have a conversation with him at that time? A. Yes, sir. [90]

Q. Had you ever met him before?

A. No, sir, never.

Q. Did he introduce himself to you?

A. Yes, sir.

Q. And tell me what the conversation was between you and Mr. Milligan at that time.

A. Mr. Milligan came to the counter and I proceeded to wait on him, and he said he wished to report a fire loss in the Washington State Under-

(Testimony of Joseph T. Brennan.)

writers, one of the companies we represented. I did not think we had any insurance at Morton, and he said that the town of Morton had been entirely destroyed and he had a $10,000 policy in the Washington State Underwriters. I looked up our records and I could find no such policy. He insisted it was in the Washington State Underwriters, and so I looked very carefully again, and I could not find anything, and he said, "I am positive that I am right, because it is the Washington State Underwriters, and it was written through Mr. Voorhees, your agent." The name was not familiar to me. However, I wanted to check it up as well as I could and I looked up the records of the agents and I could find no such agent, and I said, "Mr. Milligan, I am sure you are mistaken."

Q. Did he say anything at that time about the National Liberty Insurance Company, the defendant in this case? A. No.

Q. Was that company mentioned?

A. No company was mentioned other than the Washington State Underwriters.

Q. Did he make any inquiry at that time as to the standing [91] of the National Liberty Insurance Company, or any other fire insurance company? A. No, sir.

Mr. HULBERT.—That is all.

Cross-examination.

(By Mr. SAM A. WRIGHT.)

Q. Was a man at that time connected with your company named Crawford? A. Yes, sir.

(Testimony of George M. Crawford.)

Mr. HULBERT.—He is here. I will put him on the stand in a moment.

Q. Was he present?

A. He came to the counter when I was in about the middle of my conversation with Mr. Milligan, when Mr. Crawford came to the counter.

(Witness excused.) [92]

TESTIMONY OF GEORGE M. CRAWFORD, FOR DEFENDANT.

GEORGE M. CRAWFORD, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. HULBERT.)

Q. State your name in full, please.

A. George M. Crawford.

Q. What is your business?

A. Secretary of Seeley & Company, general insurance agents.

Q. And in what capacity are you there?

A. I have general supervision of the secretarial work of the office.

Q. Is that company connected in any way with Lamping & Company? A. No, sir.

Q. And it is not connected in any way with the National Liberty Insurance Company?

A. No, sir.

Q. They are in business here in this city?

A. Yes, sir.

(Testimony of George M. Crawford.)

Q. Do you remember of seeing Mr. W. A. Milligan in the office there at any time?

A. He was in there last summer, yes, sir.

Q. Do you remember what day it was?

A. I do not remember the exact date, but it was just after the Morton fire. I know it was last summer some time.

Q. Had you known Mr. Milligan before?

A. Yes, sir, I knew him in the summer of 1922. I think it [93] was 1922, or 1923.

Q. Did you hear a conversation between Mr. Milligan on that occasion, and Mr. Brennan, of your office? A. Yes, sir.

Q. State what you heard in connection with that conversation.

A. My desk was about as far from the counter as you are from me, and I overheard the entire conversation, and knowing Mr. Milligan, I went to the counter and spoke to him.

Q. Tell what was said.

A. I heard him tell Mr. Brennan of the fire, and stating he had a $10,000 policy in the Washington State Underwriters, and Mr. Brennan told him he could find no record of any such policy, and I heard Mr. Brennan state that it might be the Washington Underwriters, which was represented by Mr. Lamping.

Q. Was any mention made of the standing of the Washington Underwriters, or the National Liberty Insurance Company? A. No, sir.

Q. Were you in a position where you could have

(Testimony of George M. Crawford.)

heard if there had been such a conversation?

A. Yes, sir.

Q. Was the National Liberty Insurance Company mentioned at all? A. Not in my presence.

Mr. HULBERT.—You may cross-examine. [94]

Cross-examination.

(By Mr. SAM A. WRIGHT.)

Q. What time of day was that?

A. I would not say exactly, maybe just before noon or just after, I do not remember the exact time of day.

(Witness excused.)

TESTIMONY OF CLAUD MORRIS, FOR DEFENDANT.

CLAUD MORRIS, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. HULBERT.)

Q. What is your name? A. Claud Morris.

Q. Where do you live? A. At Morton.

Q. How long have you lived there?

A. About 13 years.

Q. And what is your business? [95]

A. Hardware business.

Q. Do you remember the fire that occurred down there? A. Decidedly.

Q. You were in business at that time there?

(Testimony of Claud Morris.)

A. Yes, sir.

Q. In the hardware busines?

A. I was managing the hardware business there.

Q. And your place burned? A. Yes, sir.

Q. Do you know Mr. Voorhees? A. Yes, sir.

Q. Do you know Mr. Milligan? A. I do.

Q. Do you remember meeting them, or either of them on the street Saturday morning after the fire?

A. Yes, sir.

Q. Did you overhear a conversation between them? A. I did, a very short one.

Q. What was it?

A. Well, Mr. Voorhees and I were standing on the corner, just met there, and were talking, and Mr. Milligan stepped up and asked Mr. Voorhees if he thought the insurance of his was all right, and Mr. Voorhees said, "Yes, I think it is, although I will have to verify it by wire."

Q. Did he say anything about—did he use the words "in force," "insurance in force," at any time?

A. I could not recall definitely in regard to the exact words used.

Q. You have stated as nearly as you can what was said? [96] A. Yes, sir.

Mr. HULBERT.—That is all.

Cross-examination.

(By Mr. SAM A. WRIGHT.)

Q. You are not sure of the language that was used, at all, are you?

(Testimony of Claud Morris.)

A. Not the exact words, no, just the general impression.

Q. You would not say that Mr. Milligan did not say to Mr. Voorhees, "Will there be any question about that insurance of mine?" they might have used that language? A. I think not.

Q. You think not? A. Yes, I think not.

Q. You are sure Mr. Voorhees said he would have to verify it by wire? A. Yes, sir.

Q. You talked with Mr. Milligan last week, I think, up there, did you not, and you were not certain at that time, of this conversation, were you?

A. I was certain of a portion of it, just as I have stated it.

(Witness excused.) [97]

TESTIMONY OF EVERETT LAMPING, FOR DEFENDANT.

EVERETT LAMPING, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. HULBERT.)

Q. What is your name? A. Everett Lamping.

Q. What is your business? A. Insurance.

Q. You are connected with what company?

A. Lamping & Company.

Q. And Lamping & Company is the general agent of the National Liberty Insurance Company?

(Testimony of Everett Lamping.)

A. Yes, sir.

Q. And it was through your agency that Mr. Voorhees was appointed agent at Morton for your company? A. Yes, sir.

Q. Do you remember Mr. Voorhees taking up this question of this insurance with you?

A. Yes, sir, I recall it.

Q. When was that?

A. On the morning of July 23d, 1924.

Q. And how did he take it up with you?

A. By telephone.

Q. What had been your practice and the practice of Mr. Voorhees, representing your companies, as to the writing or acceptance of insurance contracts?

A. Any business he solicited had to be submitted to my [98] office for reception or rejection.

Mr. ELIAS A. WRIGHT.—We object to that and move that the answer be stricken, on the ground that the license granted this man speaks for itself, and any private instructions between these parties would not be binding upon the plaintiff.

Mr. HULBERT.—The license does not so state. The license is in evidence. He was given a license as agent. I propose to show here the course of dealings between these parties, as showing the improbability of Mr. Voorhees doing what the plaintiff says he did, as meeting the question as to whether or not this was submitted to Mr. Lamping.

The COURT.—That can be the only purpose of it, as a circumstance, if the jury gives it credit, to determine whether or not at this particular time

(Testimony of Everett Lamping.)

and occasion, Mr. Voorhees did engage, with Mr. Milligan to insure him outright, as Mr. Milligan says he did. Any secret instructions from this general agent to Mr. Voorhees, not brought to the notice of Mr. Milligan, would not bind him. The theory of the defence is that Mr. Voorhees did not have any authority to make the contract as Mr. Milligan says he did, and the jury may consider that as a circumstance in determining that question in whether they will believe Mr. Milligan rather than Mr. Voorhees. [99] For that limited purpose I think it is competent, and the objection will be overruled. The motion to strike is denied.

Q. Now, Mr. Lamping, upon this particular occasion was that custom pursued? A. Yes, sir.

The COURT.—As far as he knows.

Q. (Mr. HULBERT.) I will ask you whether or not Mr. Voorhees did submit to you the question of writing $10,000 insurance for Mr. Milligan?

A. He did, and by telephone on July 23d, 1924.

Q. In that conversation did Mr. Voorhees say to you, "I have placed $10,000 worth of insurance," and he wanted you to send him the policy, that he had run out of policies, and wanted you to send him policies, so he could write it?

A. No, sir, no such conversation occurred.

Q. As a matter of fact, has Mr. Voorhees ever had any blank policies in his possession?

A. At no time during the entire service as an agent for the company. My three companies he never had a policy for any one of the three.

(Testimony of Everett Lamping.)

Q. In that conversation over the telephone what was said?

Mr. ELIAS A. WRIGHT.—The materiality of that. That conversation that may have occurred would not have any effect that I can see. He said that conversation did not occur and I can see no materiality to any other conversation.

The COURT.—He has a right to give his version of [100] it, just the same, to see whether or not the jury would believe the young girl, or whether she may have become confused by some similitude. The objection is overruled.

A. Mr. Voorhees called me over the phone and stated that Mr. Milligan wished insurance in the amount of $10,000, and he told me he wished to divide it $6,000 on the building and $4,000 on the contents, and I inquired what other insurance was on the building, and he told me $15,000, and due to the fact that the $15,000, plus $6,000, appeared to me to be very high, a very high amount of insurance to carry, I told Mr. Voorhees we would not accept it, nor would we cover it, and he then inquired if I would look into it and let him know, and I told him I would look into it and see what could be done, and would write him.

Q. Did you write him?

A. Immediately after the telephone conversation I went out in the main room of my office and looked up to see.

The COURT.—Did you write him?

A. And I wrote him this letter on July 24th.

(Testimony of Everett Lamping.)

Q. Is this letter, Defendant's Exhibit "C," the one you wrote?

A. Yes, sir, that is the exact copy of the letter.

Q. And you also received a letter, did you not, Defendant's Exhibit "B," from Mr. Voorhees?

A. Yes, sir.

Q. Now, then, did you answer Mr. Voorhees' letter, exhibit "B"? [101]

A. Yes, sir, on July 25, 1924.

Q. Is this Defendant's Exhibit "D" the letter you wrote him then? A. Yes, sir.

Q. And you mailed it to Morton? A. Yes, sir.

Q. I will ask you whether or not this form of insurance is the New York standard form of insurance that is used by the National Liberty Insurance Company in this state?

A. It is used by the National Liberty Insurance Company and all other companies writing fire insurance.

Mr. HULBERT.—I will offer it in evidence.

Mr. SAM A. WRIGHT.—We object to it as being immaterial.

The COURT.—I think not. It is the standard form required by statute, and the objection will be overruled.

(Blank insurance policy was then admitted in evidence as Defendant's Exhibit "E.")

DEFENDANT'S EXHIBIT "E."

8592. Deft. Ex. "E." Admitted.

STANDARD FIRE INSURANCE POLICY

Stock Company

No. 50504

Specimen

WASHINGTON UNDERWRITERS

By This Policy of Insurance

the

NATIONAL LIBERTY INSURANCE CO. OF AMERICA

Amount $———— Rate———— Premium $————

In Consideration of the Stipulations herein named and of

———————————— Dollars Premium,

Does Insure ————————————————

———————— for the term of ————————

from the ———— day of ———— 19——, at noon, (Standard Time)

to the ———— day of ———— 19——, at noon, (Standard Time)

against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding

---------- Dollars,

to the following described property while located and contained as described herein, and not elsewhere, to wit:

This policy is made and accepted subject to the foregoing stipulations and conditions, and to the

following stipulations and conditions printed on back hereof, which are hereby specially referred to and made a part of this Policy, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this Company shall have power to waive any provision or condition of this Policy except such as by the terms of this Policy may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the insured unless so written or attached.

Provisions required by law to be stated in this policy.—This policy is in a stock corporation.

IN WITNESS WHEREOF, this Company has executed and attested these presents; but this policy shall not be valid until countersigned by the duly authorized Agent of the Company at ————.

WM. G. ARMSTRONG,
Secretary.

Specimen

CHARLES H. COATES,
President.

Specimen

Countersigned at ——, this —— day of —— 19——

———————— Agent.

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swear-

ing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after the loss.

This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if

this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, Greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine, or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law, but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as

a result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss of awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruptions of business, manufacturing processes, or otherwise; nor, for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan, or description of property be referred to in this policy is shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company.

This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

This policy shall be canceled at any time at the

request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be cancelled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the *pro rata* premium.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require a removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be

liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumberances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a

creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained the loss to the amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

In the event of a disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any for-

feiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed hereon.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the in-

sured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

ASSIGNMENT OF INTEREST BY INSURED

The interest of ——— as owner of the property covered by this Policy is hereby assigned to ——— subject to the consent of the Washington Underwriters of the National Liberty Insurance Company of America.

———

(Signature of Insured)

Dated ——— 19—

Note.—To secure mortgagees, if desired, the policy should be made payable on its face to such mortgagee as follows: Loss, if any, payable to *John Doe,* mortgagee.

CONSENT BY COMPANY TO ASSIGNMENT OF INTEREST.

The Washington Underwriters of the National Liberty Insurance Company of America hereby consents that the interest of ——— as owner of the

property covered by this Policy be assigned to ————

————————Agent

Dated ——— 19—

FORM FOR REMOVAL.

Permission is hereby granted to remove the property insured by this Policy to the ———— situate ———— and this Policy is hereby made to cover the same property in new locality, all liability in former locality to cease from this date.

Rate increased to ——% Additional Premium $——

Rate reduced to ——% Return Premium $——

Dated, ——— 19—

SHEET—— BLOCK—— No.——

Standard Fire Insurance Policy. Stock Company. No. 50504. Washington Underwriters, New York. Policy of National Liberty Insurance Co. of America. Head Office 709 6th Ave., New York, N. Y. Assured. ——Date——Expires——Amount $—— Premium $—— Rate—— Property——.

Specimen.

No. of Policy——

No. of Renewal——

Amount Insured——

YEAR MO. DAY

Date of Cancel.,

" Policy,

Time in force,

Premium Paid, ...$————

" earned at rate, $————

" returned, ...$————

If *pro rata,* state reason why:

(Testimony of Everett Lamping.)

Receipt for Return Premium
To be Signed by the Assured

————Agency ——— 19—

In Consideration of

—— Dollars return premium, receipt of which is hereby acknowledged, this Policy is hereby cancelled and surrendered to the Company.

_____

Assured.

[Endorsed]: No. 4681. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 31, 1925. F. D. Monckton, Clerk.

Mr. HULBERT.—You may cross-examin*ation.*

Cross-examination.

(By Mr. SAM A. WRIGHT.)

Q. The matter of this first policy for $1,200 came to your notice, did it? [102]

A. It came to me by letter from Mr. Voorhees, submitted to my office for acceptance or rejection.

Q. And you say that that was accepted and the policy was written?

A. Written by myself, yes, sir.

Q. When was it prepared?

A. I imagine it was prepared the day it arrived in my office.

Q. Do you recall the date?

A. I do not recall the exact date.

Q. By the policy Mr. Milligan was insured from Monday, June 1, 1924, is that correct?

(Testimony of Everett Lamping.)

The COURT.—The policy will show for itself. Do not ask for something the record already shows.

Q. (Mr. SAM A. WRIGHT.) Did the policy provide it is not valid until countersigned by the agent at Morton, Washington? How was Mr. Milligan insured, if you know, between noon, June 1, and June 3, when the policy was countersigned?

A. The application for the insurance must have reached our office prior to June 1.

Q. Have you any such application?

A. We have an application form that we furnish the agents.

Q. Do you have any such application?

A. Did we in this case?

Q. Yes. A. As I recall it, yes.

Q. Then produce it?

A. I haven't it with me. [103]

Q. So that Mr. Milligan, as far as he was concerned, had nothing between June 1 and June 3 in the way of a policy of insurance?

A. I do not know whether this policy reached Mr. Milligan by June 1 or not.

Q. It could not have reached him before June 3, when it was countersigned at Morton, could it?

The COURT.—You are arguing with the witness.

Q. (Mr. SAM A. WRIGHT.) Who prepared the $2,000 policy? A. In my office.

Q. Where is that policy?

A. The policy was cancelled and it is in the Home Office of the company. The policy has to go to the Home Office when it is cancelled.

(Testimony of Everett Lamping.)

Q. It was returned to you by Mr. Voorhees?

A. Yes, sir, and it reached our office July 17th.

Mr. SAM A. WRIGHT.—That is all.

Redirect Examination.

(By Mr. HULBERT.)

Q. Counsel asked you about whether or not Mr. Milligan would be covered within certain dates, if—is this true, if the insurance was accepted by you, then you would date the policy of the date of the application? A. Yes, sir.

Mr. SAM A. WRIGHT.—We object to that as leading and suggestive.

Mr. HULBERT.—I do not know how I could ask the [104] question any other way.

The COURT.—It is a matter of argument anyway. The objection is overruled.

Mr. HULBERT.—That is all. That is our case.

(Witness excused.)

The COURT.—Anything further?

Mr. SAM A. WRIGHT.—Yes, your Honor.

[105]

REBUTTAL.

TESTIMONY OF W. T. FLETCHER, FOR PLAINTIFF (RECALLED IN REBUTTAL).

W. T. FLETCHER, recalled as a witness on behalf of the plaintiff, in rebuttal, testified as follows:

Direct Examination.

(By Mr. SAM A. WRIGHT.)

Q. I wish you to state whether or not you had a

(Testimony of W. T. Fletcher.)

conversation with Mr. Voorhees, at Morton, Washington, on July 22, 1924, at about 8 o'clock in the evening? A. I did.

Q. I will ask you to state at that time if Mr. Voorhees told you he had insured Mr. Milligan with the Morton Hotel, or words to that effect?

A. He did.

Mr. HULBERT.—I object to that, if it is intended for impeachment, as I remember Mr. Voorhees stated he did not remember any such conversation.

The COURT.—He said, "No," and even if he did say, "I do not remember," I would allow the impeachment.

Mr. HULBERT.—Then I object to his attempting to impeach the witness on a question that is wholly immaterial, and the company cannot be bound by it.

The COURT.—The objection is overruled.

[106]

Mr. SAM A. WRIGHT.—That is all.

Mr. HULBERT.—That is all.

(Witness excused.)

TESTIMONY OF STEPHEN J. BERGON, FOR PLAINTIFF (IN REBUTTAL).

STEPHEN J. BERGON, called as a witness on behalf of the plaintiff, in rebuttal, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. SAM A. WRIGHT.)

Q. What is your name?

(Testimony of Stephen J. Bergon.)

A. Steven J. Bergon.

Q. Where do you live? A. At Morton.

Q. Are you acquainted with Mr. Voorhees, the agent of the defendant company? A. Yes, sir.

Q. Do you know Mr. Milligan? A. Yes, sir.

Q. Do you recall going with Mr. Voorhees—in company with Mr. Voorhees, to Mr. Milligan's hotel on May 31, about a [107] matter of insurance?

A. Yes, sir.

Q. On that occasion did you hear Mr. Voorhees tell Mr. Milligan he ought to take $10,000 additional insurance, or words to that effect?

Mr. HULBERT.—I object to that as wholly incompetent, irrelevant and immaterial, and certainly is not a proper question for impeachment purposes.

The COURT.—The Court differs with you. The objection is overruled.

A. I did.

Q. Did you hear Mr. Milligan's answer to that?

A. Yes, sir.

Q. What did Mr. Milligan tell him?

A. He told him he would take it up with him when he got settled; that he was a little unsettled and he would take the matter up later.

Q. Did you hear the conversation on the street at Morton, or did you participate in a conversation on the streets of Morton on Friday morning after the fire, August 1st, 1924, at about between 10 and 11 o'clock in the morning?

A. I would not be absolutely certain as to the date, but it was about that time.

(Testimony of Stephen J. Bergon.)

Q. It was after the fire? A. Yes, sir.

Q. And who were the parties present?

A. Mr. Milligan, Mr. Voorhees and myself.

Q. Did Mr. Voorhees at that time tell you, in the presence of Mr. Milligan that he had insured Mr. Milligan in [108] this defendant company, or words to that effect?

Mr. HULBERT.—I object to that. There was no foundation laid for this question, and upon the further ground it is incompetent, irrelevant and immaterial as to the defendant.

(Last question read.)

The COURT.—The objection is sustained. No foundation was laid for that.

Q. (Mr. SAM A. WRIGHT.) Did you have a conversation with Mr. Voorhees that morning?

A. Yes, sir.

Q. What was that conversation about?

Mr. HULBERT.—I object to that, what the conversation was about, calling on this witness—this is not their case in chief, and there is no foundation for this examination.

The COURT.—The objection is sustained.

Q. (Mr. SAM A. WRIGHT.) I will ask you to state, Mr. Bergon, if that was the occasion when Mr. Voorhees interceded with you to take up the matter with Mr. Milligan about getting a release from Mr. Milligan as to him, Mr. Voorhees?

Mr. HULBERT.—I object to that as suggesting something to this witness, that the witness has not testified to.

(Testimony of Stephen J. Bergon.)

The COURT.—He is apparently coming down to that part of the examination on the cross-examination of Mr. Voorhees which laid the foundation for impeachment. He may answer.

(Last question read.) [109]

A. Mr. Voorhies spoke to me and said he understood that Mr. Milligan was—

Mr. HULBERT.—That is not responsive.

The COURT.—Yes, answer if that is the time you had the talk? A. Yes, sir.

Q. (Mr. SAM A. WRIGHT.) On that occasion did you ask Mr. Voorhees if he had insured Mr. Milligan? A. I did.

Q. Or used language to that effect?

A. Yes, sir.

Q. Did he tell you that he had absolutely, that he had insured him in the same company as the small company you were *interest* in?

Mr. HULBERT.—I object to that as immaterial, and not proper impeachment.

The COURT.—You laid no foundation for any such question. The only thing you asked Mr. Voorhees about was whether or not he asked him to intercede with Mr. Milligan for Mr. Voorhees.

Q. (Mr. SAM A. WRIGHT.) Do you recall Mr. Voorhees telling you he had received a check from Mr Milligan—

The COURT.—Just a minute. The Court was in error. You may read that question and answer.

(The last question but one—line 12 this page—was read.)

(Testimony of Stephen J. Bergon.)

The COURT.—No, the question as asked was that of August 1st. You asked the witness Voorhees if he had talked with Mr. Bergon and if Mr. [110] Bergon had said to the plaintiff Milligan, "Do you intend to hold Mr. Voorhees," and the plaintiff said "No, I will hold his company," and then that this witness said to Mr. Voorhees, "You insured, him Milligan?" And Mr. Voorhees said, "In the same company as that of the small policy." That was the question you put to Mr. Voorhees, and he answered it, "No." You may put that question to this witness. Make your objection when it is asked. Proceed.

Q. (Mr. SAM A. WRIGHT.) In addition to that question you have testified to, Mr. Bergon, did you ask Mr. Voorhees on that occasion if he had insured Mr. Milligan?

A. I do not remember whether it was a direct question or implied, but we were talking about it, yes.

Mr. HULBERT.—I ask to have the answer stricken. That is not the character of testimony that ought to go in before this jury. He does not know whether it was implied.

The COURT.—That much may be stricken.

Q. (Mr. SAM A. WRIGHT.) What did Mr. Voorhees say?

A. In return to my talk he throwed up his arms and said, "Yes, absolutely, he is protected, absolutely."

Mr. HULBERT.—I ask that this be stricken

(Testimony of Stephen J. Bergon.)

as not being responsive.

Mr. SAM A. WRIGHT.—I think it is.

The COURT.—It will be stricken. That is not the question you asked the witness Voorhees, and is only here for the purpose of impeaching [111] and discrediting Mr. Voorhees. The motion is granted.

Q. (Mr. SAM A. WRIGHT.) Do you recall Mr. Voorhees exhibiting to you the check for $500 which he had received from Mr. Milligan? A. Yes, sir.

Q. What did he tell you he was going to do with that check?

Mr. HULBERT.—I object to that on the ground no foundation has been laid for it.

The COURT.—I think there was. The impeaching question was put.

Q. (Mr. SAM A. WRIGHT.) I will ask you to state at the time he exhibited that check to you Mr. Bergon, if he did not say to you in substance or words to that effect, that he was going to keep that check and deduct $75 of it for his commission, and remit the balance to the company?

A. He did not say the exact amount of his commission, but he said he would deposit that check to his credit and send them—he did not say how much.

Q. I cannot hear you.

A. I would not state it exactly that way. He said he was going to deposit that check to his credit and send his personal check to the company for the payment.

Mr. HULBERT.—I ask to have that stricken as not being proper under the rule.

Mr. SAM A. WRIGHT.—I think that is sufficient.

The COURT.—I think that is sufficiently near. The question asked Mr. Voorhees was if he did not tell this witness he intended to deduct [112] $75 from that check for his commission and send the balance to the company. This witness said he did not put it quite that way, but that he was going to deposit the check to his credit and send the amount to his company in his own check.

(Witness excused.)

TESTIMONY OF W. A. MILLIGAN, IN HIS OWN BEHALF (RECALLED IN REBUTTAL).

W. A. MILLIGAN, the plaintiff, recalled as a witness in his own behalf in rebuttal, testified as follows:

Direct Examination.

(By Mr. SAM A. WRIGHT.)

Q. During any of these negotiations with Mr. Voorhees, did he ever tell you he would have to submit the matter to Lamping & Company?

A. He did not.

Q. When did you first hear of Lamping & Company in connection with this insurance company?

A. The morning after the fire. [113]

Q. Now, this $2,000 policy that was written at the

(Testimony of W. A. Milligan.)

time the $1,200 policy was written—did you see that policy? A. I did.

Q. Was it ever delivered to you? A. No, sir.

Q. Where did you see it?

A. In Mr. Voorhees' office.

Q. Did you ever order that policy?

A. I did not.

Q. Did he send you—

Mr. HULBERT.—He testified to that in chief.

Mr. SAM A. WRIGHT.—I do not recall that he did.

The COURT.—I think so.

Q. (Mr. SAM A. WRIGHT.) Did you ever order it cancelled? A. Yes, sir.

Q. I mean the $2,000 policy? A. Yes.

Q. When was that?

A. It was about 5 days after he wrote it.

Q. How did that come about?

A. He sent me a bill for $160 for $3,200 worth of insurance, and I went over to see him about it.

Q. You had not ordered that policy?

A. No, sir.

Q. Do you recall a conversation you had with Mr. Voorhees in his office the Monday after the fire? A. Yes, sir.

Q. That was after you had been to Lamping & Company's office? A. Yes, sir. [114]

Q. Did he exhibit to you a letter at that time which he had just received from Lamping & Company? A. Yes, sir.

Q. Handing you Defendant's Exhibit "B," which

(Testimony of W. A. Milligan.)

purports to be a copy of a letter dated July 23, 1924, do you know whether that is a copy of the letter? A. It is not.

Q. Handing you Defendant's Exhibit "D," I will ask you to state whether or not that is the letter?

A. No.

Q. Did he tell you, on that occasion, or did you tell him on that occasion, that Lamping & Company had told you that they had told him, or written him they did not want him to write this insurance?

Mr. HULBERT.—I object to that as not being proper rebuttal.

Mr. SAM A. WRIGHT.—I am satisfied I laid the foundation for that, and that it is proper impeachment.

Mr. HULBERT.—It is certainly not impeachment.

Mr. SAM A. WRIGHT.—I asked Mr. Voorhees if that conversation did not take place in his office.

(Last question read.)

The COURT.—On the record they wrote him they did not want him to write that insurance. That is in the letters themselves. I do not remember any such question. You started to ask Mr. Voorhees something about a conversation on Monday morning, and he interrupted you, and it was broken off and you went to the letters [115] and asked him if he had written Exhibits "A" and "B." I remember no such question, and I do not think it is material. The objection is sustained.

Q. (Mr. SAM A. WRIGHT.) Mr. Voorhees has

(Testimony of W. A. Milligan.)

testified he told you on Wednesday night, July 23, that he thought that your insurance was in force, did he ever tell you any such thing?

A. He did not.

Q. Were you and your wife in Morton in the middle of September, 1924? A. Yes, sir.

Q. And you saw Mr. Voorhees on that occasion?

A. I did.

Q. Was that after you had sent your check to him for $500? A. Yes, sir.

Q. Did you discuss it with him?

A. No, sir, I did not.

Mr. SAM A. WRIGHT.—I think that is all.

Mr. HULBERT.—No questions.

(Witness excused.) [116]

TESTIMONY OF MRS. IDA MILLIGAN, FOR PLAINTIFF (IN REBUTTAL).

Mrs. IDA MILLIGAN, called as a witness on behalf of the plaintiff, in rebuttal, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. SAM A. WRIGHT.)

Q. Your first name? A. Ida.

Q. You are the wife of W. A. Milligan, the plaintiff in this action? A. Yes, sir.

Q. Do you recall a trip to Morton, you and Mr. Milligan made after this fire? A. Yes, sir.

Q. About when was that?

A. Well, it was during September, some time.

(Testimony of Mrs. Ida Milligan.)

Q. Do you know Mr. Voorhees, the agent of the defendant company? A. Yes, sir.

Q. Did you see him on that occasion?

A. Yes, sir, I met him on the street.

Q. Did you talk with him?

A. Yes, sir, for a few minutes.

Mr. SAM A. WRIGHT.—That is all.

(Witness excused.)

Mr. SAM A. WRIGHT.—That is all, your Honor.

Mr. HULBERT.—We desire, if the Court please, to [117] present a question of law to the Court.

The COURT.—Proceed.

Mr. HULBERT.—Now that both sides have rested, the defendant challenges the sufficiency of the evidence, and asks the Court to direct a verdict in favor of the defendant under the statutes of this state, or withdraw the case from the jury and enter judgment for the defendant, for the reason that the evidence is wholly insufficient to support any verdict or judgment in favor of the plaintiff against the defendant, and particularly upon the ground that under the statute and the law of this state, an oral contract of fire insurance is not valid and cannot be enforced. In other words, that fire insurance must be in writing on the standard form. Upon the further ground that an agent created by the statute is only authorized to do those things the statute delegates or gives him the power to do, and right to do, and his right and power are clearly for the purpose of soliciting and effecting insurance in the manner provided by the statute, namely the

granting or issuing of policies countersigned by himself as agent, on the statutory form. I am going to call attention just briefly to our own statute.

(Argument.)

The COURT.—Did you raise this question on demurrer? [118]

Mr. HULBERT.—No, sir.

The COURT.—I will deny your motion and you may go to the jury now, and if there is any law that is misapplied in this trial after you have compelled the Court to go to a long trial and then raise a question that could have been raised on demurrer the Court has no patience with your contention and you may proceed with the argument.

Mr. HULBERT.—Note an exception.

(WHEREUPON respective counsel addressed the Court in argument and at the conclusion of said argument the Court instructed the jury as follows, to wit:) [119]

SECOND EXCEPTION.

The defendant prior to the argument of counsel and to the retirement of the jury excepted, and its exception was allowed, to the instructions of the Court that an oral contract of fire insurance under the statutes and laws of the State of Washington was valid and enforceable, as shown by the following portions of the Court's instructions.

> "A contract of insurance is no different from any other kind of a contract."

"You are further instructed that an oral contract of fire insurance under the laws of this state, if it is definite as to the parties insured, and the insurance company insuring the property of the insured, the property to be insured, the duration of the risk, the time of it, the amount of the premium, and the amount for which the property was to be insured, if all those things are settled upon and determined between the parties, then such an oral contract of insurance is good and valid, pending the issuance of the written policy thereafter to be issued, as was evidently contemplated between the parties in this case."

"You are further instructed that no particular words or language was necessary in order to create the contract of insurance in this or any other case. It is sufficient to create such contract if the parties used such language as reasonably tends to show their intent to effect a contract of insurance. The use of the word 'insured' or 'covered' would not necessarily have to be used, but such words as 'you are insured,' 'you are covered,' 'you are protected' if used by the agent and are believed by the insured, then the contract is in force for the time being, and if that is the situation here, proven to you by a fair preponderance of the evidence, on behalf of the plaintiff, you are instructed that such language would be sufficient to create the contract of insurance sued upon in this case, the other elements thereof,

of its certainty and definiteness being established by the evidence, if you should so find, by a preponderance thereof." [120]

* * * * * * * * * *

"If Mr. Voorhees and the plaintiff Milligan finally agreed that he was to be insured from that time, on July 22, 1924, and without entering into the minute details of the policy that was later to be issued, the inference of the law would be that they intended the ordinary and usual contract of insurance the companies were ordinarily putting out, and in this state that would be the New York Standard form, and that would be sufficient to settle the details and the terms of the contract of insurance which the law would infer; if one agreed 'I will buy insurance from you to a certain amount and at a certain price for the premium' and the other says 'I will sell it to you at that price and in the amount, taking effect from to-day' the other terms would be implied to be those of the ordinary New York Standard form, which was the form of the $1200 policy."

"So the case comes down to this. If you believe the testimony on behalf of the plaintiff Milligan, that that contract of insurance was agreed upon and made as Mr. Milligan testifies to on the night of July 22, 1924, if you believe he has established that fact by the greater weight of the evidence, in the face of the evidence put in by the defendant,

why then the plaintiff is entitled to recover, and I should say the entire amount of that policy, or the agreed $10,000."

"It is the law that a contract such as plaintiff relies upon, a contract of insurance, can be made in this state."

COURT'S INSTRUCTIONS AND EXCEPTIONS THEN AND THERE TAKEN AND ALLOWED THERETO.

The complete instructions given by the Court to the jury and the exceptions then and there taken and allowed thereto were as follows: [121]

Gentlemen of the Jury: You have heard the evidence and the argument of counsel, and now it is for the Court to deliver to you the instructions, or the charge, as it is termed.

In the main the purpose of that is to make you acquainted with the law that applies to the case, and which you will accept from the Court.

Sometimes the Court may comment on the evidence as presented before you, and he might even express an opinion as to the credibility of the witnesses, or what is or what is not proven, but it never can bind the judgment of the jury. To determine what the facts are is exclusively the function of the jury, and if the Court at any time does comment on the evidence or express an opinion as to the credibility of the witnesses, it is not done in an endeavor to bind your judgment as to the facts in the case, because the Court has neither the power nor the disposition to do so,

but it is done to guide you in the discharge of your duty, and to better enable you to arrive at the correct conclusion in the case. While you will take the law from the Court, we take the determination of the facts and the judgment as to the credibility of witnesses, what facts are proven and what are not proven, from you. That is your function.

This is what is termed a civil action, brought by the plaintiff to recover from the defendant, upon the ground that he had insured his property with the defendant at a certain time in last July, and while the contract for insurance was in force the property was destroyed, and that he made due proof of loss and demanded his money, and it [122] was not paid to him.

The defense is that there was no contract of insurance entered into between the defendant and the plaintiff, and the other defenses are set out in the answer that they have practically abandoned, about which there is no testimony at least, that the plaintiff had burned his own property. You will not be prejudiced against the defendant by reason of its setting up a defense that is not proven, because very often the defendant may set up a defense which it finds later it can not substantiate by proof and the defense is simply ignored.

In an action like this, a civil action, the burden is upon the plaintiff to prove the facts he alleges by the greater weight or the preponderance of the evidence. The rule differs from a criminal

case, as the burden is upon the Government in a criminal case, to prove the allegations of the charge beyond a reasonable doubt, before a jury can find the defendant guilty; but in a civil suit the plaintiff need only prove his case by the greater weight or the preponderance of the evidence to justify a verdict in his favor. You might conceive the evidence in behalf of the two parties as in two scales before you, and unless that which is in the plaintiff's scale is the heaviest, bears down, and carries the defendant's side up, he has not made out his case, by the greater weight or the preponderance of the evidence, and must therefore fail. If at the conclusion of the case the evidence is in equal balance, you cannot determine that the plaintiff has the greater weight with him, you might come to the conclusion you were not able [123] to believe him and his witnesses in the face of the defendant's proof, and that the weight of the evidence is not with him, or that the scales are in even balance, then the plaintiff has failed to prove his case, and your verdict must of necessity be for the defendant. You will see at once that it is not enough for a man to have a good cause of action in court, as he must not only allege it, but he must have evidence to prove it by the greater weight of the testimony when he comes before a jury in order to be entitled to a verdict at the hands of the jury.

A few general remarks as to the rules of law as to the credibiliy of witnesses. In considering the credibility of the witnesses it is your duty to ob-

serve the demeanor of the witness on the witness-stand, his manner of testifying, whether he is endeavoring to give you the truth in the matter, whether he is trying to aid the jury in arriving at the real issues in the case, or whether the contrary. You will take note of his opportunity for knowing the facts about which he testifies, and ask yourself has he any interest in the outcome of the suit, and if there is a contradiction between the witnesses, as there is in this case, it is for you to determine where the evidence conflicts and where the witnesses contradict each other, which witness you are to believe. You will take note of any contradiction of the circumstances shown in the case. Very often circumstances will point to you more unerringly the truth than the express statement of any witness. A man may swear to a certain thing on the witness stand which the [124] circumstances in the case may show to be inconsistent with the truth, and you may believe the circumstances as against the spoken testimony. It is an old saying that witnesses may testify falsely, but the circumstances will point to the truth. In so far as a witness has an interest in the case, you will consider that, and of course that applies to the plaintiff particularly. He has a large interest in this case. You will remember his interest, and take that into consideration in weighing his testimony. It is not a rule of law that a man interested in the case will testify falsely—not at all. The rule of law is that the jury will remember his interest, and

know that is the mightiest influence that may affect the conduct of men. Ask yourselves in weighing the testimony of the plaintiff whether it has affected his truthfulness and his right to be credited by you.

As to the interest of other witnesses in the case, it might be that Mr. Voorhees is interested, because if he made a contract—assumed to make a contract for the defendant he had no authority to make, while the defendant might be held liable here, Mr. Voorhees might be held liable in some action by the defendant. So you will have that in mind in weighing their credibility.

The case is after all a simple one, and yet it presents to a jury its difficulties, namely, whom to believe and how far.

It is the law that a contract such as plaintiff relies upon, a contract of insurance, can be made in this state. That is to say, if the defendant represented by its agent, if the agent assumed to enter into a contract, a definite arrangement to insure this property for [125] the plaintiff, Mr. Milligan, for the sum of $10,000, for and on behalf of the defendant, who is now before the Court, upon a policy thereafter to be issued, why then the defendant would be liable. And if those things are proven to your satisfaction by the greater weight of the evidence, then the plaintiff would be entitled to a verdict in this case.

A contract of insurance is no different from any other kind of a contract. It must contain all the essential features of a complete contract, and all

the elements of the contract must be agreed upon prior to the loss in a fire insurance contract before there can be any binding contract of insurance. The amount of the insurance to be carried must be agreed upon, and the parties to the contract, not only the person to be insured, like Mr. Milligan in this case, but the company that is to do the insuring, must be agreed upon. The property to be covered must be agreed upon; the rate to be charged, the time the policy is to run, the name of the insurance company that is to carry the insurance, and if as is claimed in this case the contract was entered into by this defendant insurance corporation, then it must be shown that someone authorized to bind the company did agree*d* upon all the essential elements of the contract.

If you find that Mr. Voorhees was the agent of the defendant company—and that is admitted now—and if you find he was authorized to make the contract in question, and he was, as the Court will explain later, and you should further find that Mr. Voorhees represented other [126] insurance companies, and he did, he represented others than the defendant, then before you can find for the plaintiff here against this defendant company, you must be convinced by a fair preponderance of the evidence, that Mr. Voorhees and the plaintiff agreed that this defendant company was to carry the risk and contracted for the entire amount of the insurance in question, and that this defendant company was agreed upon, and that the contract of insurance was complete

before the loss was sustained. If you find all the essential elements of the contract were agreed upon between Mr. Voorhees and the plaintiff, yet the plaintiff cannot recover from the defendant in this case unless it was agreed at the time that this defendant company was the company for which Mr. Voorhees was making the contract, if any such contract was made. In other words, if the plaintiff's version of the case is correct, and that he and Mr. Voorhees entered into this agreement of insurance to insure his property, yet if the company, this particular company, was not settled upon, if it was left indefinite and undecided which one of the companies represented by Mr. Voorhees should write the policy, there would be no contract that could bind this company, whatever remedy the plaintiff would have against Mr. Voorhees himself, and the Court does not say he would have any.

You are further instructed that an oral contract of fire insurance under the laws of this state, if it is definite as to the parties insured, and the insurance company insuring the property of the insured, the property to be insured, the duration of the risk, the [127] time of it, the amount of the premium, and the amount for which the property was to be insured, if all those things are settled upon and determined between the parties, then such an oral contract of insurance is good and valid, pending the issuance of the written policy thereafter to be issued, as was evidently contemplated between the parties in this case. You

are instructed that it is the law that the agent of an insurance company who has authority from his company to solicit and procure insurance for the company and to write policies of insurance and countersign the policies and collect the premium thereon, has in law apparent and implied authority to enter into oral contracts of insurance, pending the issuance of the policy. That is to say, he can agree with the insured before the policy actually issues that the policy will be in force to protect him until the policy is issued.

Any of you may order a policy of insurance today and it may take several days or a week even in the insurance office to get out that policy, and if then accepted you are insured in the meantime, and the ordinary agent of an insurance company, held out by the company as its agent, to solicit insurance has authority to enter into that sort of an arrangement, unless the company has forbidden him to do so, and has brought that home to the person seeking insurance.

It is not enough for the company to tell this agent "You cannot enter into these oral arrangements; you can accept only applications and we will say if we want to write the policy." That is not enough to shield the company from the liability the agent can impose upon [128] it if the company does not bring it home to the insured. You can see the reason for that. These agents are in every little hamlet in the country, and they solicit insurance and purport to act for the company, and the law is that they can be assumed to have full

authority to bind the company in the sort of engagement involved in this case, unless the fact that they have not has been brought by the company home to the party who applies to them for insurance.

You are further instructed that no particular words or language was necessary in order to create the contract of insurance in this or any other case. It is sufficient to create such contract if the parties used such language as reasonably tends to show their intent to effect a contract of insurance. The use of the word "insured" or "covered" would not necessarily have to be used, but such words as "You are insured," "You are covered," "You are protected" if used by the agent and are believed by the insured, then the contract is in force for the time being, and if that is the situation here, proven to you by a fair preponderance of the evidence, on behalf of the plaintiff, you are instructed that such language would be sufficient to create the contract of insurance sued upon in this case, the other elements thereof, of its certainty and definiteness being established by the evidence, if you should so find, by a preponderance thereof.

Now, Gentlemen of the Jury, to come briefly to the facts of this case, as I said to you, it will present some difficulties in determining what is the exact [129] truth in respect to this contract of insurance upon which the plaintiff counts and which the defendant denies.

It seems the plaintiff, Milligan, owned a hotel in the town called Morton, and had some insurance

on it, some he had taken out through the agency of Mr. Voorhees, a policy in the amount of $1,200, in this very same company. That was on the furnishings of the hotel, I think. And there was a $2,000 policy in some company—it is disputed between the parties—the plaintiff says by this defendant company, and the defendant says it was another company—upon the building, but that $2,000 policy was not taken up, by Mr. Milligan, but was allowed to be cancelled some time in the middle of July of 1924. Those policies are not very important except from this standpoint, that it shows there was some relationship already between Mr. Voorhees and the plaintiff Mr. Milligan, and also to show the terms upon which they finally agreed, because if Mr. Voorhees and the plaintiff Milligan finally agreed that he was to be insured from that time, on July 22, 1924, and without entering into the minute details of the policy that was later to be issued, the inference of the law would be that they intended the ordinary and usual contract of insurance the companies were ordinarily putting out. In this state that would be the New York Standard form, and that would be sufficient to settle the details and the terms of the contract of insurance which the law would infer; if one agreed "I will buy insurance from you to a certain amount and at a certain price for the premium" and the other says "I will sell it to you at that price and in the amount, taking effect [130] from to-day" the other terms would be implied to be those of the ordinary New York Standard form, which was the form of the $1,200 policy.

Both parties agreed, the plaintiff Milligan and Voorhees, that they had some talk about further insurance on this hotel property on behalf of Milligan. Milligan says that after the conversation on July 22, Mr. Voorhees came up to look over the property. They both agree that Voorhees did look over the property, and Mr. Milligan says that then and there it was agreed between him and Voorhees the hotel was to be insured for $10,000—I think $10,000 more, for one year, at a premium of $500, and the premium to be taken up and paid within 60 days, I think, but that is not very material, but any how to be paid in 60 days if not paid sooner. Mr. Milligan further says it was to be in the same company as the little policy, and Mr. Milligan testifies he saw Mr. Voorhees write out a memorandum and saw in this memorandum the name of the National Liberty Insurance Company. He got no writing whatever at that time and place. He says, however, he did ask whether the policy was in effect and would be in effect then, that he wanted it to be in effect then, and that Mr. Voorhees told him it was, and that it would take effect from that time.

In corroboration of his testimony he produces the witness Bagley, who says he sat there and heard some part of the conversation, heard Mr. Milligan and Mr. Voorhees talking about insurance, and that he heard the plaintiff say "When will it take effect?" and Mr. Voorhees said, "It takes effect now" on the evening of July 22. And Mr. [131] Bagley also says he heard Mr. Milligan ask Mr. Voorhees in what company it would be written,

and Mr. Voorhees said, "The same as your little policy," and that he heard him say something about "National," but could not say the rest of the company's name.

In further corroboration, the plaintiff Milligan calls the witness Fletcher, who says he heard Mr. Voorhees and Mr. Milligan talking in the lobby of the hotel on the night of the fire, but before it had occurred, at 7 o'clock P. M., and that he heard the plaintiff ask Mr. Voorhees if he thought his insurance was all right, and that Mr. Voorhees said, "Yes, it is all right."

Now, in further corroboration the plaintiff calls the young lady, June Mackie, the telephone girl, who testifies it was sometime—I do not think the date was fixed, other than sometime apparently before the fire—that Mr. Voorhees—I think the witness says it was on July 22 or July 23—on the 23d, Mr. Voorhees put in a long distance call to the firm of Lamping & Company, who were the general agents of the defendant company, and she says she gave him the phone—it was agreed it was Lamping & Company's phone, and that there was a conversation had in which he said he had insured Mr. Milligan for $10,000 last night, $6,000 on the building and $4,000 on the furnishings, something in substance that, and there was a letter in the postoffice going forward from Mr. Voorhees to Lamping & Company, and that he, Voorhees, did not have the form of policy that was wanted, and for the party at the other end of the line to send on a form of the policy. [132]

Now, the defendant says that much of that is not true; They produced Mr. Voorhees, who testifies the plaintiff had, before July 22, his $2,000 policy been cancelled, because he did not want and would not pay the premium. There was a little difference as to why it was not taken, but that is not of much account here—he says the plaintiff did come and ask him about the matter of more insurance on the building on Tuesday, I think that would be July 22, if I remember it rightly; and that he told the plaintiff Milligan at that time that he would consider the proposition and taken it up with his company, giving him to understand he, Voorhees, could not insure him without having a decision from the company, so Mr. Voorhees says.

He says then he did go out and examine the property on the evening of July 22, and looked it over, and made some suggestions to the plaintiff that he would have to clean up the rubbish around the place, and that he did not make any promise or intimate at that time that he would write or secure the insurance upon that property; that he did not contract with him at that time, or agree with him, Milligan, as Milligan says, at that time to write the insurance, to attach then and there, or at all, but in effect on the contrary, and that he had told him during the day that he would have to take it up with his company. And then he produces letters showing on the following day Mr. Voorhees wrote to Lamping & Company, and Lamping & Company wrote back, and refused to take the risk, and these letters are introduced in evidence before you.

Remember the offer of those letters is not to [133] prove their contents; they are not proof of their contents. The purpose of them is this: Mr. Voorhees and the defendant insist that Mr. Voorhees had no authority to make such a contract as Mr. Milligan says was made on July 22, and Mr. Voorhees in order to corroborate the fact as he states it, that he did not make the contract, as showing he was carrying out his employer's instructions, the defendant's instructions, by writing to Lamping & Company to get Lamping & Campany's consent to do that, to write the insurance in that amount, to insure Mr. Milligan for $10,000, presents these letters in evidence; but mind you, that would not be conclusive, and if Mr. Voorhees did, if he was so anxious to secure that amount of insurance, and get his commission out of it, if he overstepped his instructions from the defendant, and entered into that contract with Mr. Milligan, as Mr. Milligan says he did, even though he may have violated his instructions from his company, the company would be bound by the action of Mr. Voorhees in making that contract, because, as I said before, if they hold out an agent as having a general authority to solicit and grant insurance without advising the applicant he can not enter into any such engagement, those who negotiate with the agent and secure that sort of a contract, without knowing the company has forbidden the agent to make that sort of a contract, can still call upon the company to perform.

Now, the general law of agency is that if any

person send out an agent to solicit business for him, that agent has certain implied powers reasonably necessary to carry on that person's business, which anyone on the outside dealing with him can infer he has, and rely upon them [134] despite any secrete instruction that person may have given the agent, by which he has undertaken to take away from the agent the power he ordinarily would have.

In corroboration of Mr. Voorhees statements the defendant points to what it thinks is inconsistent conduct on the part of Mr. Milligan. The fire occurred, but before it occurred there was some testimony by one person, that I think on Wednesday evening he heard Mr. Voorhees assure Mr. Milligan at that time the insurance was all right, he was being protected from that time, but after the fire occurred the company points to what it characterizes as inconsistent conduct, and if it is proven, it is inconsistent conduct, on the part of Mr. Milligan, inconsistent with his testimony here.

It produces before you the witness Brennan, an insurance man, employed in the office of Seeley & Company, who has no connection, so it is testified, with the defendant company. And he testifies after the fire, when this property was destroyed, Mr. Milligan came to their office and told him, that he, Milligan, had $10,000 policy on that property in the Washington State Underwriters, and Mr. Brennan looked up the record and said there was no such insurance policy, and Mr. Milligan insisted he had such a policy, and had secured it through Mr. Voorhees in the Washington State Underwriters Com-

pany; and the defendant contends that if that testimony is to be believed, it would show that this defendant company was not agreed upon as the company which was to write the insurance in question, because, they argue, if it had been agreed upon that the defendant [135] National Liberty Insurance Company was to be the insurer, why on the day after, or a day or two after the fire, would Mr. Milligan go to Seeley & Company's office, and have this conversation with Mr. Brennan, contending the policy was written or to be written in the Washington State Underwriters. And in addition to that the defendant company calls in the witness Crawford, another insurance man, in the same office with Mr. Brennan, who knew Mr. Milligan, and heard the conversation between Mr. Milligan and Mr. Brennan, and he says the conversation was as Mr. Brennan testifies to, namely that Mr. Milligan said the insurance was with the *Washington* Washington Underwriters Company, and both of them say he made no mention at that time whatever of any policy in this defendant, National Liberty Insurance Company.

That is to be given consideration by the jury in weighing the testimony, and is to be given such weight as you think it is entitled to. First, did it happen? Mr. Milligan says no, if I remember the testimony rightly. Mr. Milligan denies he had that conversation that Mr. Brennan and Mr. Crawford say he had. If he did have it, why did he have it? Had he agreed with Mr. Voorhees that the National Liberty Insurance Company, the defendant company, was to insure him, if that agreement was

made with Mr. Voorhees. Ask yourselves if it is likely that he would go to Seeley & Company's office and make that claim that Mr. Crawford and Mr. Brennan say he did, if that were the fact. Is Mr. Milligan telling the truth or are Mr. Brennan and Mr. Crawford telling the truth? Mr. Brennan and Mr. Crawford say such a conversation was [136] had, and Mr. Milligan says it did not occur; who has the greater interest, or is there a feeling of affinity between insurance men generally that would make Mr. Crawford and Mr. Brennan testify falsely in helping out the defendant company? A man may be moved more by his self-interest in the hopes of getting $10,000, than if mere friendship were the consideration. I do not say either is true, but it is for you to weigh thru circumstaces their testimony in determining where the truth lies. If you do give credit to Mr. Crawford's and Mr. Brennan's statements as to what occurred at that time and place, that should go a long way towards discrediting Mr. Milligan's testimony, as between him and Mr. Voorhees as to whether this company, defendant company, did through Mr. Voorhees agree to insure this property for $10,000.

The company also brings the witness Morris to testify that after the fire he heard the plaintiff ask Mr. Voorhees if he thought his insurance was all right, and that Mr. Voorhees said "I think so; but I will have to verify it by wire before I would know." What the significance of that is, both aspects of it, is for you to decide.

It might be that if the contract was made as Mr.

Milligan says it was, he wanted to have assurance made doubly sure by asking again, but if he had agreed upon a definite contract before the fire, why did he, ask yourselves, or you can ask yourself, would Mr. Voorhees say, "I think it is all right, but I will have to verify it by wire?" Would that corroborate Mr. Voorhees, when he says before he looked at the property to figure on [137] the insurance, he had told Mr. Milligan he could only submit it to his company?

Those are all circumstances for the jury's honest consideration and judgment, in your effort to render a fair and impartial verdict in accordance with the law and the evidence in the case. The Court states no opinion of its own as to the facts. Mr. Milligan denied that conversation that Mr. Morris testified to.

There is testimony by Mr. Lamping also for the purpose I have before indicated, that Mr. Voorhees telephoned to him about the $10,000 insurance that was talked over between Mr. Voorhees and Mr. Milligan, that it was to be submitted to Mr. Lamping for determination, and the letter came along later, and Mr. Lamping declined to take the risk, but, as I said before, those letters and that conversation, are not proof of their contents at all, if you believe them, because all of evidence is here for you to say whether or not you believe it. You do not have to believe something is true because some witness says it is so. That applies to both sides. The evidence must commend itself to you as credible before you are to believe it.

It is a rule of law that where a witness is not corroborated where you would expect him to be corroborated, or where he is not *contracted* where you would expect him to be contradicted, that is a matter you may take into consideration in weighing his testimony. You will not reject the testimony of any witness arbitrarily, but you may see reasons, in his attitude, or demeanor, or his interest, or other matters, that would affect his credibility in your judgment why you would not believe him. [138] How you determine the credibility of a man in daily life, you determine it right here in regard to the man on the witness-chair.

The plaintiff appeals to the proposition that after the fire the check for the premium was paid over by the plaintiff to Mr. Voorhees, and he kept it some 60 days, if I remember rightly, and then returned it. And there is some evidence also that he had said—and that is only impeaching evidence—that he was going to deposit the check and take out his commission and send on the balance, which Mr. Voorhees denies. He says he held the check because he did not know the address of the plaintiff in the case. If Mr. Voorhees was holding it in a dilemma as to his own situation in the case, if he was fearful he might be held liable by the plaintiff or by his company if he exceeded his instructions that he had got from his company, is not a circumstance or of any materiality to be weighed against the defendant company in this case. There is no evidence they had any knowledge that Mr. Voorhees had received the check after the fire or

was holding it for 60 days.

So the case comes down to this. If you believe the testimony on behalf of the plaintiff Milligan, that contract of insurance was agreed upon and made as Mr. Milligan testifies to on the night of July 22, 1924, if you believe he has established that fact by the greater weight of the evidence, in the face of the evidence put in by the defendant, why then the plaintiff is entitled to recover, and I should say the entire amount of that policy, or the agreed $10,000. He testifies the property was worth [139] that amount of money and that the property would justify that amount of insurance, and there is no evidence to the contrary. Apparently the defendant is relying upon the contention that no such contract was made, and if the defendant's evidence, taken in connection with the plaintiff's leaves the case in equal balance, or without the greater weight on the plaintiff's side, the defendant is entitled to a verdict, and the plaintiff is entitled to nothing, and that is the case or the question the jury must decide. Do you believe the plaintiff's side sufficiently to say the greater weight of the evidence is with him? If you do, you will find for him; otherwise you will not.

It takes 12 of your number to agree in this case, and when you retire to your jury-room you will select a foreman from your number who will sign the verdict you agree upon. Any exceptions?

Mr. CLARK.—It is admitted that the premium of $500 is not paid.

The COURT.—The testimony is that the check was returned. Any exceptions from the plaintiff.

Mr. SAM A. WRIGHT.—No.

The COURT.—From the defendant?

Mr. HULBERT.—We except to the instruction of the Court wherein the Court instructed the jury that an oral contract, under the statutes and laws of the State of Washington, was valid and enforcible.

We also desire to except to that part of the instructions of the Court in [140] which the Court instructed the jury that Mr. Voorhees was authorized to make the insurance that is mentioned in the plaintiff's complaint and sued upon in this case.

We except to the instruction of the Court given to the jury to the effect that Mr. Voorhees under the statutes and laws of this state would be authorized and have the authority to bind the defendant company under the law and under the facts shown in this case, upon an oral contract or afreement of insurance, until the policy of insurance be issued or at all. The suit is upon an alleged contract of oral insurance and not to insure.

And we also except to the instruction given by the Court with reference to the purpose of the letters, if your Honor please, that the Court instructed the jury upon. The Court told the jury the only purpose of the letters went to the authority, the alleged authority of Mr. Voorhees to

enter into this contract. We contend in addition to that the purpose of the letters was to show and to corroborate Mr. Voorhees' statement that he did not enter into it.

The COURT.—That is what I told the jury. [141]

Mr. HULBERT.—I beg your Honor's pardon. I think the Court instructed the jury that the purpose of the letters went to the question of the authority.

The COURT.—No. The letters, Gentlemen of the Jury, are no evidence, no proof of their contents, but they are simply in the case for this purpose: Mr. Voorhees says he did not make the contract, and to corroborate that statement that next morning he wrote the company asking leave to make the contract, and he argues why did he write that letter if he had contracted as Mr. Milligan says he did. That is all they are there for. If you find they corroborate him, that he did not make the contract, that is all they are in for.

Mr. HULBERT.—I also except the *the* instructions that if the jury finds for the plaintiff it will find for the plaintiff in the sum of $10,000 in any event, because the insurance premium never was paid. That is admitted.

The COURT.—Oh, yes, I will call attention to that.

Mr. ELIAS A. WRIGHT.—When we presented the check we presented it not only as an exhibit, but as a tender. It is perfectly good to-day, and it is here. [142]

The COURT.—Do you plead an offset?

Mr. SAM A. WRIGHT.—They have not.

The COURT.—Very well; the exception may be noted. The Court will give you the pleadings, although you do not need them; you know the issues involved here—and two forms of verdict, one for each party, and you will have with you the exhibits introduced in evidence; although I will not say you have to read them; but you can look at them if you want to.

(Whereupon the jury retired to consider their verdict.) [143]

The defendant, in support of this second exception submits the stenographic report of the trial heretofore set out in support of the first exception, with all the exhibits, being all of the evidence offered and received at the trial herein, together with the Court's complete instructions hereinabove set forth and the exceptions then and there taken and allowed thereto, and submits the same as a bill of exceptions in support of this its second exception. [144]

THIRD EXCEPTION.

The defendant prior to the argument of counsel and to the retirement of the jury excepted and its exception was allowed to the instructions of the Court that Mr. Voorhees was authorized to make the insurance that is mentioned in the plaintiff's complaint and sued upon in this case as shown by the following portions of the Court's instructions:

"If you find that Mr. Voorhees was the

agent of the defendant company—and that is admitted now—and if you find he was authorized to make the contract in question, and he was, as the Court will explain later, and you should further find that Mr. Voorhees represented other insurance companies, and he did, he represented others than the defendant, then before you can find for the plaintiff here against this defendant company, you must be convinced by a fair preponderance of the evidence, that Mr. Voorhees and the plaintiff agreed that this defendant company was to carry the risk and contracted for the entire amount of the insurance in question, and that this defendant company was agreed upon, and that the contract of insurance was complete before the loss was sustained. If you find all the essential elements of the contract were agreed upon between Mr. Voorhees and the plaintiff, yet the plaintiff cannot recover from the defendant in this case unless it was agreed at the time that this defendant company was the company for which Mr. Voorhees was making the contract, if any such contract was made. In other words, if the plaintiff's version of the case is correct, and that he and Mr. Voorhees entered into this agreement of insurance to insure his property, yet if the company, this particular company, was not settled upon, if it was left indefinite and undecided which one of the companies represented by Mr. Voorhees should write the policy, there would be no con-

tract that could bind this company, whatever remedy the plaintiff would have against Mr. Voorhees himself, and the Court does not say he would have any."

"Mr. Voorhees and the defendant insist that Mr. Voorhees had no authority to make such a contract as Mr. Milligan says was made on [145] July 22, and Mr. Voorhees in order to corroborate the fact as he states it, that he did not make the contract, as showing he was carrying out his employer's instructions, the defendant's instructions, by writing to Lamping & Company to get Lamping & Company's consent to do that, to write the insurance in that amount, to insure Mr. Milligan for $10,000, presents these letters in evidence; but mind you, that would not be conclusive, and if Mr. Voorhees did, if he was so anxious to secure that amount of insurance, and get his commission out of it, if he overstepped his instructions from the defendant, and entered into that contract with Mr. Milligan, as Mr. Milligan says he did, even though he may have violated his instructions from his company, the company would be bound by the action of Mr. Voorhees in making that contract, because, as I said before, if they hold out an agent as having a general authority to solicit and grant insurance without advising the applicant he cannot enter into any such engagement, those who negotiate with the agent and secure that sort of a contract, without knowing the company has forbidden

the agent to make that sort of a contract, can still call upon the company."

"If you believe the testimony on behalf of the plaintiff Milligan, that that contract of insurance was agreed upon and made as Mr. Milligan testifies to on the night of July 22, 1924, if you believe he has established that fact by the greater weight of the evidence, in the face of the evidence put in by the defendant, why then the plaintiff is entitled to recover, and I should say the entire amount of that policy, or the agreed $10,000."

The defendant in support of this third exception submits the stenographic report of the trial heretofore set out in support of the first exception with all exhibits being all of the evidence offered and received at the trial herein, together with the Court's complete instructions and the exceptions then and there taken and allowed thereto, as set forth in support of the second exception and submits the same as a bill of exceptions in support of this, its third exception. [146]

FOURTH EXCEPTION.

The defendant, prior to the argument of counsel and to the retirement of the jury, excepted, and its exception was allowed, to the instructions of the Court to the effect that Mr. Voorhees under the statutes and laws of this state would be authorized and have the authority to bind the defendant company under the law and under the facts shown in this case upon an oral contract or agreement of

insurance until the policy of insurance could be issued or at all, as shown by the following portions of the Court's instructions:

"It is the law that a contract such as plaintiff relies upon, a contract of insurance, can be made in this state. That is to say, if the defendant represented by its agent, if the agent assumed to enter into a contract, a definite arrangement to insure this property for the plaintiff, Mr. Milligan, for the sum of $10,000, for and on behalf of the defendant, who is now before the Court, upon a policy thereafter to be issued, why there the defendant would be liable. And if those things are proven to your satisfaction by the greater weight of the evidence, then the plaintiff would be entitled to a verdict in this case."

"You are instructed that it is the law that the agent of an insurance company who has authority from his company to solicit and procure insurance for the company and to write policies of insurance and countersign the policies and collect the premium thereon, has in law apparent and implied authority to enter into oral contracts of insurance, pending the issuance of the policy. That is to say, he can agree with the insured before the policy actually issues that the policy will be in force to protect him until the policy is issued.

Any of you may order a policy of insurance to-day and it may take several days or a week even in the insurance office to get out that

policy, and you are insured in the meantime, and the ordinary agent of an insurance company, held out by the company as its agent, to solicit insurance has authority to enter into that sort of an arrangement, unless the company has forbidden him to do so, and has *bought* that home to the person seeking insurance. [147] It is not enough for the company to tell this agent 'you cannot enter into these oral arrangements; you can accept only applications and we will say if we want to write the policy.' That is not enough to shield the company from the liability the agent can impose upon it if the company does not bring it home to the insured. You can see the reason for that. These agents are in every little hamlet in the country, and they solicit insurance and purport to act for the company, and the law is that they can be assumed to have ful authority to bind the company in the sort of engagement involved in this case, unless the fact that they have not has been brought by the company home to the party who applied to them for insurance."

"Mr. Voorhees and the defendant insist that Mr. Voorhees has no authority to make such a contract as Mr. Milligan says was made on July 22, and Mr. Voorhees in order to corroborate the fact as he states it, that he did not make the contract, as showing he was carrying out his employer's instructions, the defendant's instructions, by writing to Lamping & Company

to get Lamping & Company's consent to do that, to write the insurance in that amount, to insure Mr. Milligan for $10,000, presents these letters in evidence; but mind you, that would not be conclusive, and if Mr. Voorhees did if he was so anxious to secure that amount of insurance, and get his commission out of it, if he overstepped his instructions from the defendant, and entered into that contract with Mr. Milligan, as Mr. Milligan says he did, even though he may have violated his instructions from his company, the company would be bound by the action of Mr. Voorhees in making that contract, because, as I said before, if they hold out an agent as having a general authority to solicit and grant insurance without advising the applicant he can not enter into any such engagement, those who negotiate with the agent and secure that sort of a contract, without knowing the company has forbidden the agent to make that sort of a contract, can still call upon the company."

"If you believe the testimony on behalf of the plaintiff Milligan, that that contract of insurance was agreed upon and made as Mr. Milligan testifies to on the night of July 22, 1924, if you believe he has established that fact by the greater weight of the evidence, in the fact of the evidence put in by the defendant, why then the plaintiff is entitled to recover, and I should say the entire amount of that policy, or [148] the agreed $10,000."

The defendant, in support of this its Fourth Exception, submits the stenographic report of the trial heretofore set out in support of the First Exception with all the exhibits, being all of the evidence offered and received at the trial herein, together with the Court's complete instructions and the exceptions then and there taken and allowed thereto set out in support of the Second Exception, and submits the same as a bill of exceptions in support of this its Fourth Exception. [149]

FIFTH EXCEPTION.

That defendant prior to the argument of counsel and to the retirement of the jury excepted and its exception was allowed, to the instruction of the Court that if the jury finds for the plaintiff, it will find for the plaintiff in the sum of $10,000, for the reason that the insurance premium was never paid, said instruction being as follows:

> "If you believe the testimony on behalf of the plaintiff Milligan, that that contract of insurance was agreed upon and made as Mr. Milligan testifies to on the night of July 22, 1924, if you believe he has established that fact by the greater weight of the evidence, in the face of the evidence put in by the defendant, why then the plaintiff is entitled to recover, and I should say the entire amount of that policy, or the agreed $10,000."

Defendant, in support of this its Fifth Exception submits the stenographic report of the trial heretofore set out in support of the First Exception

with all exhibits, being all of the evidence offered and received at the trial herein, together with the Court's complete instructions and the exceptions then and there taken and allowed thereto as set forth in support of the Second Exception and submits the same as a bill of Exceptions in support of this its Fifth Exception. [150]

WHEREUPON counsel for the defendant presents the foregoing as its bill of exceptions in the above case and prays that the same may be settled, allowed, signed and certified by the Judge of said court.

BATTLE, HULBERT, GATES & HELSELL.

ROBERT A. HULBERT,
FRED G. CLARKE,
Attorneys for Defendant. [151]

[Title of Court and Cause.]

STIPULATION RE BILL OF EXCEPTIONS.

It is hereby stipulated by the parties hereto through their attorneys, that the Clerk of the above-entitled court may transmit the foregoing bill of exceptions proposed by the defendant and consisting of pages 1 to 131, inclusive, to the Hon. George M. Bourquin.

And it is further stipulated that said proposed bill of exceptions may be approved, allowed and settled as a true bill of exceptions.

Dated at Seattle, Washington, this 8th day of July, 1925.

WRIGHT & WRIGHT,
Attorneys for Plaintiff.

BATTLE, HULBERT, GATES & HELSELL,

ROBT. A. HULBERT,
FRED G. CLARKE,
Attorneys for Defendant. [152]

[Title of Court and Cause.]

ORDER SETTLING AND ALLOWING BILL OF EXCEPTIONS.

The foregoing bill of exceptions proposed by the defendant, consisting of pages 1 to 131, inclusive, having been duly served upon the attorneys for the plaintiff and having been lodged with the Clerk of the above-entitled court within due time and the attorneys for the plaintiff having stipulated in writing to the settling and allowing of said bill of exceptions and said bill of exceptions conforming to the truth and being in proper form, and some corrections in the instructions having been by me made,—

NOW THEREFORE, I, the undersigned Judge of the above-named court and the Judge who tried the above-entitled action, hereby certify that the foregoing proposed bill of exceptions contains all of the evidence and testimony introduced upon the trial of said cause, together with all objections and exceptions made and taken to the admission or ex-

clusion of testimony and all motions; offers to prove and admissions and rulings thereon and all exceptions taken thereto; and all the original exhibits admitted in evidence on the trial of said cause are hereby made a part of said bill of exceptions to be appended thereto and embodied therein; and I further certify that said proposed bill of exceptions contains all the Court's [153] instructions to the jury and the exceptions taken thereto; and said proposed bill of exceptions is hereby certified to be a true bill of exceptions and the same is approved, allowed and settled and ordered filed and made a part of the record in said cause.

Done in open court, in term, this 11 day of July, 1925.

BOURQUIN,
Judge.

We consent to the entry of the foregoing order.

WRIGHT & WRIGHT,
Attorneys for Plaintiff.

Copy of defendant's proposed bill of exceptions received and service thereof acknowledged this 26th day of June, A. D. 1925.

WRIGHT & WRIGHT,
E. A.
Attorneys for Plaintiff, W. A. Milligan.

[Endorsed]: Lodged Jun. 26, 1925.

[Endorsed]: Filed Jul. 13, 1925. [154]

[Title of Court and Cause.]

PETITION FOR WRIT OF ERROR.

And now comes National Liberty Insurance Company of America, a corporation, the defendant herein, and says that on the 15th day of June, 1925, this Court entered judgment herein in favor of the plaintiff and against this defendant in which judgment and the proceedings had prior thereunto in this cause certain errors were committed, to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

WHEREFORE this defendant prays that a writ of error may issue in its behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors complained of, and that a transcript of the record, proceedings, and papers in this cause duly authenticated may be sent to the said Circuit Court of Appeals for the Ninth Circuit, and that an order be made fixing the amount of security to be given by this defendant conditioned as the law directs, and upon giving such bond as may be required, that all further [155] proceedings may be suspended until the determination of said Writ of Error by

the said Circuit Court of Appeals for the Ninth Circuit.

BATTLE, HULBERT, GATES & HELSELL,

ROBT. A. HULBERT,
FRED G. CLARKE,

Attorneys for National Liberty Insurance Company of America, a Corporation, Defendant and Petitioner in Error.

Copy of foregoing petition for writ of error received August 1st, 1925.

WRIGHT and WRIGHT,
Attorneys for W. A. Milligan, Plaintiff.

[Endorsed]: Filed Aug. 1, 1925. [156]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

The defendant in this action in connection with its petition for a writ of error makes the following assignments of error which it avers occurred upon the trial of the cause, to wit:

I.

The Court erred in overruling and denying defendant's challenge at the close of all the evidence to the sufficiency of the evidence to sustain a verdict for the plaintiff and in overruling defendant's motion to instruct the jury to return a verdict for the defendant for the reason that:

(1) The alleged contract of fire insurance herein

sued upon was not in writing and on the New York standard form as provided by the laws of the State of Washington.

(2) The alleged agent of the defendant insurance company only had the right and power under the laws of the State of Washington to solicit and effect fire insurance by countersigning written policies issued by the company on the New York standard form.

(3) The alleged agent of the defendant insurance [157] company only had the right and power under his authority from the defendant, as shown by the evidence, to solicit fire insurance and to submit applications for the same to the company for its acceptance or rejection, and if accepted and a policy issued to countersign the same as provided by the laws of the State of Washington.

(4) The evidence is sufficient to establish the existence of an oral contract of fire insurance.

II.

The Court erred in overruling defendant's motion to set aside the verdict of the jury and to grant to defendant a new trial for reasons assigned in support of defendant's assignment of error No. I.

III.

The Court erred in rendering judgment in favor of the plaintiff and against the defendant, and in refusing to render judgment in favor of the defendant and against the plaintiff for the reasons

hereinabove assigned in support of defendant's assignment of error No. I.

IV.

The Court erred in its charge to the jury wherein the Court instructed the jury that an oral contract of fire insurance under the statutes and laws of the State of Washington was valid and enforceable as shown by the following portions of the Court's instructions:

(1) "It is the law that a contract such as plaintiff relies upon, a contract of insurance, can be made in this state. That is to say, if the defendant represented by its agent, if the agent assumed to enter into a contract, a definite arrangement to insure this property for the plaintiff, Mr. Milligan, for the sum of $10,000, for and on behalf of the defendant, who is now before the [158] Court, upon a policy thereafter to be issued, why then the defendant would be liable. And if those things are proven to your satisfaction by the greater weight of the evidence, then the plaintiff would be entitled to a verdict in this case."

(2) "A contract of insurance is no different from any other kind of a contract."

(3) "If you find that Mr. Voorhees was the agent of the defendant company—and that is admitted now—and if you find he was authorized to make the contract in question, and he was, as the Court will explain later, and you should further find that Mr. Voorhees represented other insurance companies, and he did, he represented others than the defendant, then before you can

find for the plaintiff here against this defendant company, you must be convinced by a fair preponderance of the evidence, that Mr. Voorhees and the plaintiff agreed that this defendant company was to carry the risk and contracted for the entire amount of the insurance in question, and that this defendant company was agreed upon, and that the contract of insurance was complete before the loss was sustained."

(4) "You are further instructed that an oral contract of fire insurance under the laws of this state, if it is definite as to the parties insured, and the insurance company insuring the property of the insured, the property to be insured, the duration of the risk, the time of it, the amount of the premium, and the amount for which the property was to be insured, if all those things are settled upon and determined between the parties, then such an oral contract of insurance is good and valid, pending the issuance of the written policy thereafter to be issued, as was evidently contemplated between the parties in this case." [159]

(5) "You are instructed that it is the law that the agent of an insurance company who has authority from his company to solicit and procure insurance for the company and to write policies of insurance and countersign the policies and collect the premium thereon, has in law apparent and implied authority to enter into oral contracts of insurance, pending the issuance of the policy. That is to say, he can agree with the insured before the policy actually issues that the policy will

be in force to protect him until the policy is issued."

(6) "Any of you may order a policy of insurance to-day and it may take several days or a week even in the insurance office to get out that policy, and if they accepted you are insured in the meantime, and the ordinary agent of an insurance company, held out by the company as its agent, to solicit insurance has authority to enter into that sort of an arrangement, unless the company has forbidden him to do so, and has brought that home to the person seeking insurance."

(7) "It is not enough for the company to tell this agent 'You cannot enter into these oral arrangements; you can accept only applications and we will say if we want to write the policy.' That is not enough to shield the company from the liability the agent can impose upon it if the company does not bring it home to the insured. You can see the reason for that. These agents are in every little hamlet in the country, and they solicit insurance and purport to act for the company, and the law is that they can be assumed to have full authority to bind the company in the sort of [160] engagement involved in this case, unless the fact that they have not has been brought by the company home to the party who applies to them for insurance."

(8) "You are further instructed that no particular words or language was necessary in order to create the contract of insurance in this or any other case. It is sufficient to create such contract if the parties used such language as reason-

ably tends to show their intent to effect a contract of insurance. The use of the word 'insured' or 'covered' would not necessarily have to be used, but such words as 'You are insured,' 'You are covered,' 'You are protected' if used by the agent and are believed by the insured, then the contract is in force for the time being, and if that is the situation here, proven to you by a fair preponderance of the evidence, on behalf of the plaintiff, you are instructed that such language would be sufficient to create the contract of insurance sued upon in this case, the other elements thereof, of its certainty and definiteness being established by the evidence, if you should so find, by a preponderance thereof."

(9) "* * * if Mr. Voorhees and the plaintiff Milligan finally agreed that he was to be insured from that time, on July 22, 1924, and without entering into the minute details of the policy that was later to be issued, the inference of the law would be that they intended the ordinary and usual contract of insurance the companies were ordinarily putting out. In this state that would be the New York Standard form, and that would be sufficient to settle the details and the terms of the contract of insurance which the law would infer; [161] if one agreed 'I will buy insurance from you to a certain amount and at a certain price for the premium' and the other says 'I will sell it to you at that price and in the amount, taking effect from to-day' the other terms would be implied to be those of the ordinary New York

Standard form, which was the form of the $1,200 policy."

(10) "Mr. Voorhees and the defendant insist that Mr. Voorhees had no authority to make such a contract as Mr. Milligan says was made on July 22, and Mr. Voorhees in order to corroborate the fact as he states it, that he did not make the contract, as showing he was carrying out his employer's instructions, the defendant's instructions, by writing to Lamping & Company to get Lamping & Company's consent to do that, to write the insurance in that amount, to insure Mr. Milligan for $10,000, presents these letters in evidence; but mind you, that would not be conclusive, and if Mr. Voorhees did if he was so anxious to secure that amount of insurance, and get his commission out of it, if he overstepped his instructions from the defendant, and entered into that contract with Mr. Milligan, as Mr. Milligan says he did, even though he may have violated his instructions from his company, the company would be bound by the action of Mr. Voorhees in making that contract, because, as I said before, if they hold out an agent as having a general authority to solicit and grant insurance without advising the applicant he can not enter into any such engagement, those who negotiate with the agent and secure that sort of a contract, without knowing the company has forbidden the agent to make that sort of a contract, can still call upon the company to perform." [161½]

(11) "If you believe the testimony on behalf

of the plaintiff Milligan, that that contract of insurance was agreed upon and made as Mr. Milligan testifies to on the night of July 22, 1924, if you believe he has established that fact by the greater weight of the evidence, in the face of the evidence put in by the defendant, why then the plaintiff is entitled to recover, and I should say the entire amount of that policy or the agreed $10,000."

For the reason that

(1) There cannot be an oral contract of fire insurance in this state but such insurance must be in writing and on the New York standard form as provided by the statutes and laws of the State of Washington.

(2) The alleged agent of the defendant insurance company only had the right and power under the laws of the State of Washington to solicit and effect fire insurance by countersigning written policies issued by the company on the New York standard form.

(3) The alleged agent of the defendant insurance company only had the right and power under his authority from the defendant, as shown by the evidence, to solicit fire insurance and to submit applications for the same to the company for its acceptance or rejection, and if accepted and a policy issued to countersign the same as provided by the laws of the State of Washington.

V.

The Court erred in its charge to the jury wherein the Court instructed the jury that Mr. Voorhees

under the statutes and laws of this state would be authorized and have the authority to bind the defendant company under the law and under the facts shown in this case upon an oral contract or agreement of insurance until the policy of insurance could be issued, or at all, [162] as shown by the portions of the Court's instructions hereinabove set out in support of defendant's assignment of error No. IV and particularly those portions of the instructions numbered herein 1, 3, 4, 5, 6, 7, 8, 9, 10 and 11 for the reasons hereinabove assigned in support of defendant's assignment of error No. IV, and for the further reason that this action is upon an alleged oral contract of fire insurance and not on a contract to insure.

VI.

The Court erred in its charge to the jury wherein the Court instructed the jury that Mr. Voorhees was authorized to make the insurance that is mentioned in the plaintiff's complaint and sued upon in this case as shown by the portions of the Court's instructions hereinabove set out in support of defendant's fourth assignment of error and particularly those portions of the instructions numbered herein 1, 3, 4, 5, 6, 7, 8, 9, 10 and 11 for the reasons hereinabove assigned in support of defendant's assignment of error No. IV.

VII.

The Court erred in its charge to the jury wherein the Court instructed the jury that if it finds for the plaintiff, it will find for the plaintiff in the sum of

$10,000.00 as shown by that portion of the Court's instructions hereinabove set out in support of defendant's fourth assignment of error, and herein numbered 10 for the reasons hereinabove assigned in support of the defendant's assignment of error No. IV, and for the further reason that the insurance premium was never paid. [163]

WHEREFORE the National Liberty Insurance Company of America, a corporation, plaintiff in error, prays that said judgment of the District Court of the United States for the Western District of Washington, Northern Division, may be reversed.

Dated this 1st day of August, A. D. 1925.

BATTLE, HULBERT, GATES & HELSELL,
ROBT. A. HULBERT,
FRED G. CLARKE,
Attorneys for Defendant,
Petitioner in Error.

Copy of foregoing assignment of errors received August 1st, 1925.

WRIGHT & WRIGHT,
Attorneys for W. A. Milligan, Plaintiff.

[Endorsed]: Filed Aug. 1, 1925. [164]

[Title of Court and Cause.]

ORDER ALLOWING WRIT OF ERROR.

This 5th day of August, 1925, came the defendant by its attorneys and filed herein and presented to the Court its petition praying for the allowance of a writ of error, an assignment of the errors intended to be urged by it, praying, also, that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that the amount of a bond conditioned as a supersedeas may be fixed, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the court does allow the writ of error prayed for by the defendant.

IT IS FURTHER ORDERED that a bond in the sum of Twelve Thousand Dollars conditioned according to law be executed in behalf of the defendant with good and sufficient surety to be approved by the undersigned and that upon said bond being executed, approved and filed, [165] said judgment in this cause shall forthwith be superseded, and all proceedings in this cause stayed until the final determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 5 day of August, 1925.

WM. H. HUNT,
United States Circuit Judge.

Service of foregoing order by receipt of copy thereof acknowledged this 7th day of August, 1925.

ELIAS A. WRIGHT and
SAM A. WRIGHT,
Attorneys for W. A. Milligan, Plaintiff.

[Endorsed]: Filed Aug. 7, 1925. [166]

[Title of Court and Cause.]

WRIT OF ERROR BOND.

KNOW ALL MEN BY THESE PRESENTS: That we, National Liberty Insurance Company of America, a corporation, defendant above named, is principal, and the Standard Accident Insurance Co., a corporation, organized under the laws of the State of Michigan, and authorized to transact a general surety business in the State of Washington, as surety, are held and firmly bound unto W. A. Milligan, plaintiff above named in the full and just sum of Twelve Thousand and No/100 Dollars to be paid to said W. A. Milligan, his attorneys, successors, administrators, executors, or assigns, to which payment well and truly to be made we bind ourselves, our successors, assigns, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this the 5th day of August, A. D. 1925.

WHEREAS lately at a regular term of the District Court of the United States for the Western

District of Washington, Northern Division, sitting at Seattle, in said District, in a [167] suit pending in said court between W. A. Milligan as plaintiff and National Liberty Insurance Company of America, a corporation, as defendant, cause No. 8952 on the law docket of said court final judgment was rendered against the said National Liberty Insurance Company of America, a corporation, for the sum of ten thousand dollars and costs, and the said National Liberty Insurance Company of America, a corporation, has obtained a writ of error and filed a copy thereof in the Clerk's office of the said court to reverse the judgment of the said Court in the aforesaid suit, and a citation directed to the said W. A. Milligan, plaintiff above named, citing him to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco in the State of California according to law within thirty days (30) from the date thereof.

Now the condition of the above obligation is such that if the said National Liberty Insurance Company of America, a corporation, shall prosecute its writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

Signed: NATIONAL LIBERTY INSURANCE COMPANY OF AMERICA.
By EVART LAMPING,
Attorney-in-fact,
Principal.

STANDARD ACCIDENT INSURANCE CO.

[Seal] By PIERCE J. DEASY,
Attorney-in-fact,
Surety.

Approved the 5 day of August, 1925.

WM. H. HUNT,
United States Circuit Judge.

Service of foregoing writ of error bond by receipt of copy thereof acknowledged this 7th day of August, 1925.

ELIAS A. WRIGHT and
SAM A. WRIGHT,
Attorneys for W. A. Milligan, Plaintiff.

[Endorsed]: Filed Aug. 7, 1925. [168]

State of California,
City and County of San Francisco,—ss.

On this 5th day of August, in the year one thousand nine hundred and twenty-five, before me, Kathryn E. Stone, a notary public in and for the said City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared Pierce J. Deasy, know to me to be the attorney-in-fact of the Standard Accident Insurance Co., the Corporation that executed the within instrument, and known to me to be the person who executed the said instrument on behalf of the Corporation therein named and acknowledged to me that such Corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal in the City

and County of San Francisco the day and year in this certificate first above written.

[Seal] KATHRYN E. STONE,

Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires March 1, 1929. [169]

[Title of Court and Cause.]

ORDER DIRECTING CERTIFICATION OF ORIGINAL EXHIBITS.

It is hereby ORDERED that the exhibits now part of the record in the above-entitled cause need not be set out by copy or otherwise in the transcript of record upon writ of error, but that the same shall be certified up to the Circuit Court of Appeals for the Ninth Circuit with the transcript of the bill of exceptions.

Dated this 19 day of August, 1925.

FRANK S. DIETRICH,
Presiding Judge.

We consent to the entry of the foregoing.

WRIGHT & WRIGHT,
Attorneys for the Plaintiffs.

[Endorsed]: Filed Aug. 19, 1925. [170]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please prepare, certify and forward, as provided by law, to the United States Circuit Court of Appeals for the Ninth Circuit as a record on writ of error to the District Court of the United States for the Western District of Washington, Northern Division, a complete typewritten transcript of the following files, records and proceedings in the above-entitled cause, to wit:

Complaint.
Order of removal.
Answer.
Reply.
Verdict.
Judgment.
Motion for new trial.
Court's opinion and order overruling motion for new trial.
Order extending time to serve and lodge bill of exceptions.
Bill of exceptions. [171]
Petition for writ of error.
Assignment of errors.
Order allowing writ of error.
Supersedeas bond on writ of error.
Writ of error.
Citation on writ of error.
Order directing certification of exhibits.
This praecipe.

The provisions of the Act of February 13, 1911, are hereby expressly waived.

BATTLE, HULBERT, GATES & HELSELL.

ROBT. A. HULBERT,
FRED G. CLARKE,
Attorneys for Defendant–Plaintiff in Error.

Copy of foregoing praecipe received this 19th day of August, 1925.

ELIAS A. WRIGHT and
SAM A. WRIGHT,
Attorneys for Plaintiff–Defendant in Error.

[Endorsed]: Filed Aug. 19, 1925. [172]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 172, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on

file in the office of the Clerk of said District Court, and that the same constitute the record on return to writ of error herein, from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the plaintiff in error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [173]

Clerk's fees (Act of February 11, 1925) for making record, certificate or return, 415 folios at 15¢	$62.25
Certificate of Clerk to Transcript of record, with seal	.50
Certificate of Clerk to Original Exhibits, with seal	.50
Total....	$63.25

I hereby certify that the above cost for preparing and certifying record, amounting to $63.25, has been paid to me by attorneys for plaintiff in error.

I further certify that I hereto attach and herewith transmit the original writ of error and the original citation in this cause issued.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court,

at Seattle, in said District, this 27 day of August, 1925.

[Seal] ED. M. LAKIN,

Clerk United States District Court Western District of Washington.

By S. M. H. Cook,
Deputy. [174]

[Title of Court and Cause.]

WRIT OF ERROR.

United States of America,
Ninth Judicial Circuit,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Western District of Washington, Northern Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you between National Liberty Insurance Company of America, a corporation, plaintiff in error, and W. A. Milligan, defendant in error, a manifest error has happened to the damage of National Liberty Insurance Company of America, a corporation, plaintiff in error, as by said complaint appears, and we being willing that error, if any hath been, should be corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you if judg-

ment be therein given, that under your seal you send the record and proceedings [175] aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco in the State of California, where said Court is sitting, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held, and the record and proceedings aforesaid being inspected, the United States Court of Appeals may cause further to be done therein to correct the error what of right, and according to the laws and customs of the United States should be done.

WITNESS the Honorable WILLIAM H. TAFT, Chief Justice of the United States, this 5th day of August, 1925.

[Seal] F. D. MONCKTON,
Clerk United States Circuit Court of Appeals for the Ninth Circuit.

Allowed this the 5 day of August, A. D. 1925.

WM. H. HUNT,
United States Circuit Judge.

Service of foregoing writ of error by receipt of copy thereof acknowledged this 7th day of August, 1925.

ELIAS A. WRIGHT and
SAM A. WRIGHT,
Attorneys for W. A. Milligan, Plaintiff.

Copy of foregoing writ of error received and filed this 7th day of August, 1925.

ED. M. LAKIN,
Clerk.
By T. N. Egger,
Deputy.

[Endorsed]: Filed Aug. 7, 1925. [176]

[Title of Court and Cause.]

CITATION ON WRIT OF ERROR.

United States of America,
Ninth Judicial Circuit,—ss.

The President of the United States of America, to W. A. Milligan, GREETING:

You are cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the courtroom of said court, in the city of San Francisco, in the State of California, within thirty (30) days after the date of this citation, pursuant to writ of error filed in the clerk's office of the District Court of the United States, for the Western District of Washington, Northern Division, wherein National Liberty Insurance Company of America, a corporation, is plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable WILLIAM H. TAFT, Chief Justice of the Supreme Court of the United States the 5 [177] day of August, A. D. 1925.

WM. H. HUNT,
United States Circuit Judge.

Service of foregoing citation on writ of error by receipt of copy thereof acknowledged this 7th day of August, 1925.

ELIAS A. WRIGHT and
SAM A. WRIGHT,
Attorneys for W. A. Milligan, Plaintiff.

Filed Aug. 7, 1925. [178]

[Endorsed]: No. 4681. United States Circuit Court of Appeals for the Ninth Circuit. National Liberty Insurance Company of America, a Corporation, Plaintiff in Error, vs. W. A. Milligan, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filed August 31, 1925.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

[Title of Court and Cause.]

STIPULATION RE PRINTING TRANSCRIPT OF RECORD.

IT IS HEREBY STIPULATED by and between the plaintiff in error and the defendant in error, through the undersigned, their attorneys, that the Transcript of Record prepared by the Clerk of the District Court of the United States for the Western District of Washington, Northern Division, at the request of the plaintiff in error, contains all the record, proceedings and papers that the material and necessary to a hearing of this cause on Writ of Error in the above-entitled Court.

AND IT IS FURTHER STIPULATED by and between the above parties that the transcript of record as prepared by said Clerk of the District Court, and this stipulation, shall be printed as the transcript of record herein, as provided by law and the rules of the above-entitled court, omitting therefrom, however, all captions and verifications.

Dated this 27th day of August, 1925.

BATTLE, HULBERT, GATES & HELSELL,

ROBT. A. HULBERT,
FRED G. CLARKE,
Attorneys for Plaintiff-in-Error.

ELIAS A. WRIGHT,
SAM A. WRIGHT,
Attorneys for Defendant-in-Error.

[Endorsed]: Filed Sep. 1, 1925. F. D. Monckton, Clerk.